REMEDIES OF THE UNPAID SELLER UNDER ULIS AND THE 1980 UN CONVENTION

A Thesis submitted to the University of Bristol for the degree of Doctor of Philosophy in Laws by

HAMZEH AHMAD HADDAD

No portion of this work has been submitted in support of an application for another degree of the University of Bristol or of any other University.

August, 1984

I hereby declare that the whole work on which the thesis is based was my independent work .

H. Haddad

ACKNOWLEDGEMENT

I should like to express my sincere thanks to my supervisor Professor M.P. Furmston whose encouragement, criticism and useful discussions helped me very much in the preparation of this work.

I am also indebted to the staff of both the Law Library of the University of Bristol and the Institute of Advanced Legal Studies in London for the considerable facilities given to me when the thesis was being prepared.

My special gratitude to my wife Abeer for her patience, understanding and encouragement throughout the work.

SYNOPSIS

This study deals with the remedies of the unpaid seller in international sale of goods from the viewpoint of two conventions. The first is the Hague Convention of 1964 to which the Uniform Law on the International Sale of Goods (ULIS) is annexed, and the other is the 1980 UN Convention on Contracts for the International Sale of Goods.

The study falls broadly into five chapters and a preliminary chapter as well.

The preliminary chapter will deal with the main problems concerning the buyer's obligation of payment such as the nature of price, place and time of payment.

The first chapter will deal with the remedy of avoidance. Five main questions will be examined here, that is, the doctrine of fundamental breach, additional time notice, process of avoidance, avoidance in case of anticipatory breach and of sale by instalments and, finally, the effects of avoidance.

The second chapter will be concerned with damages where the general principles on this remedy including the foreseeability test and the doctrine of mitigation will be discussed. The assessment of damages on the

basis of the resale as well as the current price formula will also be considered under this chapter.

The third chapter will deal with the seller's action for the price. Two main questions will be considered here. Firstly, the general rule to the effect that the seller has the right to require payment to be made ; secondly, the exceptions to this rule.

The fourth chapter will deal with the doctrine of "exemptions" , that is,the buyer's non-liability for his failure to perform. The two main questions to be considered under this chapter are the conditions required for the exemption and the effect of this doctrine.

The last chapter will study the remedy of suspension of performance including the stoppage in transit. This chapter is divided into two main topics: availability of suspension and its effects.

TABLE OF CONTENTS

References are to paragraph numbers.

TABLE OF CASES

References are to paragraph numbers .

ABBREVIATIONS

I - Periodicals

A.Bus.L.J.	:	American Business Law Journal.
A.J.C.L.	:	American Journal of Comparative Law .
Aus.L.J.	:	Australian Law Journal.
Cal.W.Int.L.J.	:	California Western International Law Journal .
C.L.J.	:	Cambridge Law Journal .
Com.L.YB.	:	Comparative Law Yearbook .
Dr.et Pratique du Com.Int.	:	Droit et Pratique du Commerce International .
H.I.L.J.	:	Harvard International Law Journal.
H.L.J.	:	Harvard Law Journal .
I.C.L.Q.	:	International and Comparative Law Quarterly .
Italian YB.of Int. L.	:	Italian Yearbook of International Law .
Int.Cont.L.and F.Rev.	:	International Contract - Law and Finance Review.
J.B.L.	:	Journal of Business Law .
L.and Con.Prob.	:	Law and Contemporary Problems.
M.L.R.	:	Modern Law Review .
M.U.L.R.	:	Melbourne University Law Review.
NW J. of Int.L. and Bus.	:	Northwestern Journal of International Law and Business.
Rev. Int.Dr.Comp.	:	Revue International de Droit Comparé.

Rev.Trim.Dr.Com.	:	Revue Trimestrielle de Droit Commercial .
Scan.Stud.in Law	:	Scandinavian Studies in Law.
Stan.L.Rev.	:	Stanford Law Review .
Tul.L.Rev.	:	Tulane Law Review .
UNIDROIT	:	Unification du Droit-Yearbook, International Institute for the Unification of Private Law .
Un .of pan.L. Rev.	:	University of Panselvania Law Review.

II - Other Abbreviations

C.C.	:	Civil Code.
CITC.	:	Czechoslovak International Trade Code (Act No. 101 / 1963).
COMECON General Conditions	:	Ceneral Conditions of Delivery of Goods between Organizations of the Member Countries of the Council for Mutual Economic Assistance (1968).
Conference (The)	:	The UN Conference on Contracts for the International Sale of Goods (Vienna , 1980).
Convention (The)	:	UN Convention on Contracts for the International Sale of Goods (1980).
DUSA	:	Draft Uniform Sale of Goods Act (1981) in Canada .
ECE	:	Economic Commission for Europe .

Hague Conference	:	Diplomatic Conference on the Unification of the Law Governing the International Sale of Goods (the Hague , 1964) . Two Volumes: Records (VoL.I) and Documents (VoL. II).
Int.Enc.Of Com.Law	:	International Encyclopedia of Comparative Law .
OLRC Report	:	Ontario Law Reform Commission Report on Sale of Goods , 1979. Three Volumes.
S.G.	:	Secretary General of UNCITRAL.
SGA	:	English Sale of Goods Act 1979.
UCC	:	Uniform Commercial Code in USA.
UNCITRAL	:	UN Commission on International Trade Law .
ULIS	:	Uniform Law on the International Sale of Goods (The Hague, 1964).
W.G.	:	Working Group on International Sale of Goods established by UNCITRAL at its second session held in 1969.

INTRODUCTION

1. Laws covered by this study

The subject of the current study is discussed from the viewpoint of the international sale of goods as codified on a global level by two laws.

The first is the "Uniform Law on the International Sale of Goods" (ULIS) which was the outcome of the Hague Convention of 1964. This Convention entered into force on 17 August 1972 and the Law annexed thereto has become operative in the UK by the Uniform laws on International Sales Act 1967.(1) By virtue of s.3.3 of this Act, the Uniform Law shall apply to a contract of sale only if it has been chosen by the parties as the law of the contract.(2)

The Law consists of six chapters: sphere of application, general provisions, obligations of the seller, obligations of the buyer, provisions common to the obligations of both parties and passing of the risk. It is noteworthy that this Law does not contain a unified remedial system; its policy is based

---

1- 1) See Graveson & Cohn, Uniform Laws on International Sales Act 1967, (1968); Feltham, 30 M.L.R. 1967, p 670;Halsubry's Laws of England, vol.41, 4th ed. 1983, para. 962; Simmonds, 111 Solicitors' Journal, p 781.

2) According to Art.V of the Hague Convention, "any state may ... declare ... that it will apply the Uniform Law only to contracts in which the parties thereto have ... chosen that Law as the law of the contract". In this connexion, it may be interesting to mention that in German-British =

on the fact that each obligation, whether undertaken by the seller or by the buyer, is followed by its own remedies.(3)

The second is the "UN Convention on Contracts for the International Sale of Goods" of 1980 which came into existence as a result of UNCITRAL's efforts. In its second session, the Commission established a Working Group in order to ascertain which modifications of the existing texts "might render them of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose...".(4)

After preparing a (new) draft convention, the Working Group recommended the adoption of new texts.(5) According to a resolution taken by the General Assembly,(6) a UN Conference was then held at Vienna in 1980 to consider the final draft convention as approved by UNCITRAL.(7) The outcome of the Conference was the adoption of the above Convention(8) which

---

1- =) and Dutch-British sales transactions, German and Dutch Courts held, as noted, that ULIS was applicable and the reservation of the foreign state should be disregarded unless the parties had expressly Chosen English Law as the law of their contract, (Magnus, 3 Com. L. YB, 1979, p 105, 110).

3) For a discussion of this approach and its disadvantages, see A/CN.9/WG.2/WP.15, passim; see also A/CN.9/87, annex 4, paras. 22 ff.

4) Off. Rec. of the G.A.24th Sess. Supp. No. 18 (A/7618), para. 38, in UNCITRAl Yearbook 1968-1970, p 95.

5) For those texts, see A/CN.9/116, annex 1.

6) Resolution 33/93, in A/CONF.97/19, p xiii.

7) For the texts of that draft, see A/CONF.97/19, p 5.

consists of four parts: sphere of application and general provisions (part I), formation of the contract (part II), sale of goods (part III) and final provisions (part IV). This Convention has not yet come into force.(9)

It is to be noted that, while the UN Convention contains provisions for the formation of the contract (part II), ULIS is not concerned with this question which was left to another convention, that is, the Hague "Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods" of 1964 to which the "Uniform Law of Formation" (ULFIS or ULF) is annexed.(10) By virtue of Art. 92 of the UN Convention, however, a contracting state may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by either part II (formation of the contract)or part III (sale of goods) of the Convention.(11)

1- 8) For the texts of the Convention, see ibid, p 187. It was reprinted in 1980 International Legal Materials, p 668.

9) According to Art.99.1, the Convention "enters into force ... after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession...". But until 6 June 1984, only 6 states have become parties to it, see A/CN.9/257, p 4.

10) This Law has also been given effect in the UK by the same Act referred to above;see the authorities cited in note 1,supra.

11) For example, Denmark, Finland, Norway and Sweden declared that they would not be bound by part II of the Convention (A/CN.9/257, p 4).

As to the relation between the UN Convention and ULIS, Art. 99.3 of the former provides that any state which is a party to the Hague Convention becomes a party to the UN Convention must at the same time denounce the Hague Convention by notifying the government of the Netherlands to that effect.(12)

Insofar as the question of remedies is concerned, it will be seen later that there are considerable differences between the two laws. Suffice it here to say that, unlike ULIS, the relevant provisions under the UN Convention have been consolidated. It contains two unified sets of provisions: the first is designed for the buyer's remedies while the other is concerned with the seller's remedies.(13) Under both laws, however, there are various common provisions relevant to remedies, which apply to both parties.(14)

A particular attention, on the other hand, has been given in this study, where this is necessary, to English and French Law as well. While the former constitutes the origin and basis of Common Law system, the latter is undoubtedly considered a good pattern of Civil Law system. In fact, both systems constitute the main source from which the provisions of ULIS and the UN Convention have been derived.

1- 12) See generally Monaco, 3 Italian YB. of Int.L. 1977, p 50.
13) Arts.45-52 and Arts.61-65 respectively; see further the documents cited in note 3 supra.
14) These provisions, which will be discussed later, are stated under part III, Ch.V of the Convention (Arts.71-88) and under Ch.V of ULIS (Arts.71-95).

Finally, some other domestic laws have also been considered in the notes. In particular, reference has been made to American Uniform Commercial Code (UCC), Czechoslovak International Trade Code : Act 101/1963 (CITC) and (Canadian) Draft Uniform Sale of goods Act (DUSA) as adopted by the Uniform Law Conference in its 63rd annual meeting held in 1981.

2. Availability of seller's remedies

Under English Law, the remedies relevant to the current study are available to the unpaid seller who is defined by s.38.1 of the SGA as follows:

"The seller of goods is an unpaid seller within the meaning of this Act-

a) When the whole price has not been paid or tendered;

b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise."

There is no need to discuss this sub-section which has been given the most careful consideration by English Law writers, and it is sufficient to point out the following observations.

Firstly, the seller is considered to be unpaid so long as any part of the price has not yet been paid.

Secondly, the seller is no longer an "unpaid" seller if a valid tender of the price is made.(1) Therefore, he cannot

exercise his rights against the goods[2] nor can he claim interest on the unpaid sum after the tender, though such tender does not discharge the buyer from performance.[3]

Finally, the seller's lien, stoppage in transit and claim for damages may be exercised even before maturity of payment. This is the case when, in respect of the first two remedies, the buyer becomes insolvent after the conclusion of the contract[4] or when, with relation to the third remedy, the buyer's breach is anticipatory.[5]

In contrast, neither ULIS nor the Convention has even used the term "unpaid seller". Both, however, have linked the seller's remedies with the buyer's failure to perform (or to pay) in accordance with the contract and the Law.[6] This fact would suggest that there is a failure on the part of the buyer if he never tenders payment. Likewise, any tender which is not in conformity with the contract and the Law, such as a tender in a place or in currency other than that required by the contract, may be regarded as a bad tender and, therefore,

---

2- 1) For the meaning of a valid tender (of money) see Cheshire, Fifoot and Furmston, Law of Contract, 10th ed. 1981, p 501; Chitty on Contracts, vol.1, 25th ed. 1983, paras. 1444 ff; Halsbury's Law of England 4th ed., vol.9 paras. 523 ff.

2) See also Benjamin, Sale of Goods, 2nd ed., 1981, para. 1152.

3) Benjamin, ibid, para. 1282; see also Halsbury's Laws of England, vol.9, para. 521.

4) Post, paras. 168, 171 f.

5) Post, particularly para. 66.

6) See in particular Art.61.1 of ULIS; Art.61.1 of the Convention.

the seller is not bound to accept it. Nevertheless, it may well be that his refusal to accept such tender is restricted by the principle of good faith which prevails in international trade law(7) and by the fact that the buyer is entitled, in certain circumstances, to furnish a commercially reasonable substitute instead of his original performance.(8)

On the other hand, some remedies may become available to the seller for the mere anticipatory(9) or prospective(10) failure (breach) by the buyer. Moreover, the fact that the buyer's failure is not due to his fault may prevent the seller from resorting to some, but not all, remedies. In other words, the buyer may not, in these circumstances, be liable for damages or interest in spite of his failure; even so, the seller may be entitled to avoid the contract or even to recover the price as the case may be.(11)

3. Division

The questions relevant to this study will be examined under six chapters as follows:

Preliminary chapter: Buyer's Obligation of Payment.

Chapter I : Avoidance of the Contract.

Chapter II : Damages.

3- 7) See, e.g., Art.7.1 of the Convention in which this principle is expressly recognized.

8) Post, para. 153.

Chapter III : Recovery of the Price.

Chapter IV : The Doctrine of Exemptions.

Chapter V : Suspension of Performance.

3- 9) Post, paras. 65 f.

10) Post, Ch. V, particularly para. 164.

11 See the effects of the doctrine of exemption, post, paras. 155 ff.

PRELIMINARY CHAPTER:

BUYER'S OBLIGATION OF PAYMENT

4. Introduction

There is no doubt that the buyer's duty to pay the price, which constitutes the consideration for the various duties undertaken by the seller, is the most important obligation imposed upon him in every contract of sale. Both ULIS and the Convention have provided for several primary questions relating to this duty, i.e., the concept of the price, its determination, place and time of payment. These questions will be considered in the succeeding paragraphs.

5. Nature of price

The price is an essential element in every sale without which the contract does not exist at all, that is to say that it is void. But this granted fact must not give rise to confusion; as will be seen below, the contract may be validly concluded even though, in some legal systems, it does not contain any reference to the price. On the other hand,neither ULIS nor the Convention directly defines the contract of sale; nor do they provide that the price must be expressed in money or otherwise. Nevertheless, at first sight it is quite easy to conclude that the whole structure of either is based upon the existence of a contract of sale in its narrow sense. That is, the contract must be concluded between a buyer and a seller; while the obligations of the latter are focused on goods, the basic obligation of the former, setting aside taking delivery, is to pay the price which must be expressed, it is suggested,

in some national currency.(1) If, at any rate, this question is to be governed by the proper law of the contract, it is also true that almost all national laws require that the price must be paid in money(2) and this is the clear position of both English(3) and French(4) Law.

The question which may arise here relates to the situation in which the price is payable partly in money and,particularly, partly in goods. In answering this question, the rule under English Law amounts to this: a contract may be treated as a contract of sale notwithstanding the fact that part of the price is something other than money.(5) And it has been suggested that the crucial answer depends upon whether the money or the goods are the substantial part of the consideration given by the buyer; while the contract in the former event is considered sale, it is one of barter or exchange in

---

5- 1) It may be interesting to mention that there was a proposal before the W.G. to make a reference, in a particular case concerning payment, to the currency of the seller's country; one main reason for rejecting that proposal was that the question of international payments should be left outside the purview of the law, see A/CN.9/75, paras.158f. See, however, note 7 below.

2) Langen, Transnational Commercial Law, 1973,p 158. But see ss. 2-304(1) of UCC and 2.6(1) of DUSA; under both, the price may be made payable in money or otherwise.

3) S.2.1 of the SGA.

4) Mazeaud, Leçons de Droit Civil, t.3, vol.2, paras.735, 860.

5) See eg. G.J. Dawson (Clapham) Ltd. v. H & G.Dutfield [1936] 2 All E.R. 332;see further Atiyah, Sale of Goods, 6th ed. pp 5f; Schmitthoff, Sale of Goods, 2nd ed. p 50; see also OLRC Report, vol. 2, p 65.

the latter.(6) Conceding that the contract price must, under ULIS and the Convention, be expressed in money, it may nevertheless be so difficult to assume that neither applies where part of such price has been expressed in goods.(7) However, it is important to bear in mind in advance that this study is based upon a primary assumption, that is, the price is payable only in money.

6. Validity of contract

Art. 14.1 of the Convention provides that: "A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes a provision for determining the quantity and the price." An equivalent provision may not be found under ULIS for it does not govern the questions concerning the formation of the contract or, more precisely, the offer and acceptance which were left to another Uniform Law.(1)

5- 6) Atiyah, ibid, p 6.

7) As regards ULIS, see Graveson & Cohn, Uniform Laws on International Sales Act 1967 (1968), p 52, who indicate that the Law applies to part-exchange contracts but not to pure exchange contracts; this view is based on the conference document Doc. Conf./C.R./Comm. 6.

6- 1) Supra, para. 1.

Standing alone, the above provision leads to the conclusion that the contract is not deemed to be concluded if it neither determines the price nor includes the criterion for its determination(2); the parties' will to this effect may be express or implicit. This approach is closer to French than to English Law. The rule prevailing under the former is that the price ought to be fixed by the parties in their contract, or at least the means for its calculation ought to be indicated thereunder; otherwise, the contract is void.(3) But this is not the approach of English Law in which the contract may be considered valid even though it does not contain any reference for determining the price; in such a case, the buyer must pay a reasonable price.(4) It has been held, however, that this rule applies only to the situation in which the contract is silent about the price; if, therefore, the contract provides, for example, that "the price or prices shall be agreed upon from time to time", there is no contract at all.(5)

6- 2) See also A/CONF. 97/5 comment on art.12,particularly paras. 1,14; but cf, Honnold, Uniform Law for International Sale Under 1980 UN Convention, 1982,para.137, particulary note 8.

3) Houin, 1964 ICLQ, Supp. Pub. 9, p 16, 19; see also Mazeaud, t.3, vol. 2, particularly paras. 862, 870.

4) By virtue of s. 8 of the SGA; see further para. 7 below. But it has been considered that the absence of an agreement as to the price may provide good evidence that the parties have not yet reached a concluded contract (Atiyah, p 20).

5) May & Butchers Ltd. v. The King [1934] 2K.B. 17, 21.

Another relevant provision stated in ULIS and the Convention as well calls for consideration. Art. 57 of the former reads: "Where the contract has been concluded but does not state a price or make provision for the determination of the price, the buyer shall be bound to pay the price generally charged by the seller at the time of the conclusion of the contract." The equivalent provision under the Convention is Art.55 which reads: "Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged at the time of the conclusion of the contract for such goods under comparable circumstances in the trade concerned."

The criteria set forth by these provisions for calculating the price will be discussed below. For the moment, it is sufficient to consider whether the above language of both laws regards the contract as being validly concluded even where it does not include any reference to the price. In answering this question, the opening words of Art. 57 of ULIS are quite plain to the effect that this Article is confined to cases in which the contract has been concluded;(6) and, by virtue of Art. 8, ULIS does not govern, as a rule, the formation of the contract. The result is in brief that Art. 57 does not apply

---

6- 6) See also A/CN.9/87, annex 2 (comment of UK, para.3); A/CN.9/WG.2/WP.15, para.13.

unless the contract has been (validly) concluded according to the proper law of the contract.(7) As to the Convention, it is indeed difficult to assume that it produces any definite answer. Remembering Art. 14, which has just been considered, Art. 55 seems to be liable to dual interpretation.

It may be argued, in the first place, that this Article does not apply except "where the contract has been validly concluded . But, unlike ULIS, the validity or invalidity of the contract is not necessarily subject to national laws;(8) rather, a distinction should be drawn between whether or not part II of the Convention under which Art 14 falls is applicable.(9) If so, the result is that the contract is invalid according to the Convention itself (Art. 14). If not, then the question is subject to the law applicable to the contract.

In the second place, it is possible to say that Art. 55 makes it clear that a contract may be "validly concluded" even though it does not contain any reference for determining the price. In that case, the parties are considered to have impliedly made reference to the criteria stated in this Article.(10)

6- 7) A/CN.9/75,para.153; A/CN.9/100,para.83. Cf.,art.67 of draft ULIS (1956) which reads"...the parties may not plead any rule of municipal law which renders invalid a contract which does not stipulate a price";cf.,also Kahn,17 Rev. Trim Dr. Com. 1964, p 689, 721.

8) Cf,Kahn, 33 Rev. Int. Dr. Comp. 1981, p 951, 980, who seems to adopt another view.

9) See supra, para. 1, see also Bonell, Dr. et Pratique du Com. Int. (1981) p 7, 24.

10) This is the express view of Honnold, ibid, paras.137,325; but cf, Kahn, ibid.

This might mean, in other words, that the provision stated in Art. 14, so far as the determination of the price is concerned, has been amended by Art. 55.

7. Determination of price

Bearing in mind the foregoing discussion, the criterion for determining the price in ULIS and the Convention presuposes that the contract neither fixes the price nor contains a provision for its determination; that is to say, that the contract is silent about the price. It would suggest that this also includes the case in which it is not possible, for any reason, to apply the contractual term concerning the price, as, for instance, when it states that the price is to be agreed upon later but the parties could not reach an agreement to this effect.[1] In these circumstances, the buyer must pay, according to ULIS, that price which is "generally charged by the seller at the time of the conclusion of the contract."[2] Certainly, this language is vague and therefore subject to different interpretations.

In one view, for example, it has been argued that the price imposed by the seller is absolute even if it is unexpected

---

7- 1) In English Law, such terms may even lead to the invalidity of the contract (supra, para.6).

2) Art.57 (supra, para.6). See also s.340.2 of CITC:"...the buyer shall pay such purchase price, which the seller usually obtains for the same goods...".

or unfair since it is the duty of the buyer to inquire and discover what the contract price is.(3) According to another view refuting this argument, the seller cannot demand such price if that would contravene the principle of good faith which rules ULIS; so the price is invalid unless it is fair.(4) In this context, it has also been said that where the price is not stated in the contract, the previous price between the parties, by virtue of Art. 9 of ULIS on course of dealing, would be the agreed price; and in the absence of previous dealings between the parties, the price generally charged to the third parties would be applied.(5)

In any case, it may be that the key question is not whether or not the seller can demand whatever price he wants, for his demand is expressly confined to such price which is "generally" charged by him and this is, on the other hand, the only restriction; rather, it relates to the meaning of the word "generally" which is indeed a matter of circumstances to be decided at the time of making the contract. At one extreme, it would be quite easy to discover what price is "generally" charged by the seller; this is so when, for instance, the goods sold are fungible(6) and the seller's prices are fixed in advance. At the other

---

7- 3) Graveson & Cohn, p 86.

4) Langen, p 160.

5) A/CN.9/WG.2/WP.15, para.15.

6) On the meaning of fungible goods, see post, para. 120.

extreme, the goods sold may be unique in the sense that each item of this type has its own price; or such goods may be fungible but, simply, the seller is not a "merchant" without dwelling upon the meaning of this expression. In these circumstances, it may be impossible to say that there is a price "generally" charged by the seller. The result may then be clear, that is, it may not be possible to apply the relevant text to these situations or the like.(7)

However, after excessive and considerable discussions,(8) that criterion was replaced in the Convention by "the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned."(9) Obviously, this language, as has been observed, eliminates the possibility that the price charged by the seller will control when the seller's price is out of line with prices generally charged; but the seller's price might provide some evidence of the price that is "generally charged" and might be

---

7- 7) But see s.340.2 of CITC in which the buyer must, in these circumstances, pay "...such purchase price, which is paid for similar goods and under similar contractual conditions at the time of the conclusion of the contract". Cf., art.67 of draft ULIS in which reference was made to " a reasonable price determined, if possible, on the basis of the current market price at the time of the conclusion of the contract".

8) See in particular the debate of the Conference (First Committee), in A/CONF.97/19, pp 120 (amendments to art.51) 363-366, 367f and 392f.

9) Art.55, supra, para. 6.

significant when a comparable product is not sold by others.(10) Again, however, the same difficulty of interpreting the word "generally" stated in ULIS' text arises here.(11)

On the other hand, both laws are in agreement to the effect that the relevant time for determining the price is that at which the contract was concluded. Thus, any subsequent rise or fall of prices generally charged for the same type of goods sold is immaterial.

In English Law, by contrast, where the contract is silent about the price, the buyer must pay a reasonable price which is a question of fact dependant on the circumstances of each particular case.(12) Presumably, it may be difficult to conclude that the application of the above criteria, at least under the Convention, would result in binding the buyer to pay other than a reasonable price. In spite of that, it has been considered that the reasonable price under English Law is usually ascertained by reference to the current price at the time of delivery;(13) and this is the main difference between English

---

7- 10) Honnold, Uniform Law, para. 327. Cf, the draft text as adopted by UNCITRAL (art.51) where the primary reference was made to the seller's price.

11) In his comment on the draft convention as adopted by the W.G., the S.G. has noted that the relevant provision offers no formula for creating a reasonable price if the price "generally charged" does not exist(A/CN.9/116, annex 2, comment on art.36, para.9).

12) S.8 of the SGA; which is the same under ss.2-305 of UCC & 5.3(1) of DUSA.

13) Benjamin, para.185. This is clearly the position of both UCC and DUSA (ibid).

Law, on the one hand and, on the other, both ULIS and the Convention.

One further rule, which is agreed upon by ULIS and the Convention need not be considered in detail. If the price is fixed according to the weight, in case of doubt it is to be determined by the net weight.(14) Thus, this rule, which seems to be in conformity with usages generally followed in international trade,(15) does not apply where it is clear from the contract or otherwise that reference is to be made to the gross weight for determining the price.

8. Preliminary steps for payment

Art. 69 of ULIS provides that: "The buyer shall take the steps provided for in the contract, by usage or by laws and regulations in force, for the purpose of making provision for or guaranteeing payment of the price, such as the acceptance of a bill of exchange, the opening of a documentary credit or the giving of a banker's guarantee."

While Art. 54 of the Convention provides that:"The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made."

7- 14) Arts.58 of ULIS and 56 of the Convention.

15) Document V/Prep/1, in Hague Conference, vol. 2, p 65.

It is of prime significance to note that the provision of ULIS falls under the title of "other obligations of the buyer".(1) Thus, the preliminary steps undertaken by the buyer in respect of payment are distinguished from his duty to pay. The effects of this distinction is important in practice so far as the seller's remedies are concerned. For example, the concepts of ipso facto avoidance(2) and of additional time notice,(3) which are relevant to the remedies for non-payment, do not appear under the remedial provisions designed for the buyer's failure to perform "other obligations" imposed upon him.(4)

But this is not the situation under the Convention where Art. 54 above is clear to the effect that any preliminary step necessary to enable payment to be made is regarded as part of the buyer's duty to pay.(5) This may include registering the contract at a governmental body, submitting an application or obtaining in advance a liscence for remitting the funds abroad and (or) the providing of a guarantee for timely payment. Therefore, the buyer's failure to comply with any of these duties or the like is considered to be: firstly, an actual breach and not anticipatory, and, secondly, a failure relating to payment of the price. As to the latter fact, it seems that

---

8- 1) For a criticism of this approach, see A/CN.9/87, annex 4, para. 33.
2) Post Ch. I, s. III.1.
3) Post Ch.I, s.II.
4) By virtue of Art.70.
5) See also A/CONF. 97/5, comment on art.50, paras.1-2.

no practical benefit could be gained from it insofar as the seller's remedies are concerned;[6] by virtue of Art. 61, these remedies are available for any (actual) breach committed by the buyer whether it relates to payment of the price or otherwise.[7] Accordingly, the major significance of Art. 54 of the Convention lies in the former fact, i.e, in considering the buyer's failure in these circumstances as an actual breach giving rise to the (seller's) remedies under Arts. 61-64.[8]

9. Place of payment

This question does not raise any difficulty in practice where the intention of the parties as inferred from the contract, usage or course of dealing between them indicates the place of payment. In this case, the buyer is bound to make payment at that place. Otherwise, payment must be effected, under ULIS and the Convention, at the seller's place of business[1] or, if he does not have a place of business, at his habitual residence.[2] The result of this rule is that

---

8- 6) But cf., Honnold, Uniform Law, para. 323.

7) See, however, Art.64.1 (post.para.34) and compare this language with Art.63.1 (post, para.34)

8) See A/CONF.97/5, para.50; Honnold, ibid.

9- 1) Arts.59.1 of ULIS and 57.1 of the Convention.Cf,s.348.1 of CITC in which payment must be made"at the contracted place,or otherwise,at the place of the seller's seat(domicile)";cf., also ss.2-310(a) and 5.8(1) of DUSA:"payment is due at the ...place at which the buyer is to receive the goods...".

2) Art.59.1 of ULIS (see also Art.1.2); Art.10(b) of the Convention.

the buyer would bear the risks and costs of payment.(3) A similar principle seems to be applied in English Law(4) as a result of the well-established rule which amounts to this:"If there is no stipulation as to the place of payment, it is the duty of the debtor to seek out the creditor at whatever place he happens to be".(5) Similarly, if the goods are sold by a seller who is in England to someone resident abroad, the courts mostly conclude that payment should be made in England.(6)

The general rule under French Law is different. According to which, payment must be made at the place of delivery(7) which is, in principle, the place at which the goods sold were located at the time of the contract; and if the goods were not located at any particular place, delivery and payment must be effected at the seller's domicile.(8)

Again, under ULIS and the Convention the buyer must follow the seller even if he has changed his place of business (or his habitual residence); but in such an event, the latter

---

9- 3) See also Langen, p 161; Doc. V/Prep/1, in Hague Conference, vol. 2, p 66; s.348.1 of CITC.

4) Benjamin, para.705.

5) Korner v. Witkowitzer [1950] 2K.B.128, 159; see also Drexel v. Drexel [1916] 1 Ch.251, 259-260.

6) See eg. Charles Duval & Co.Ltd.v. Gans [1904] 2K.B.685;Rein v. Stein [1892] 1Q.B.753.

7) Art. 1651 of C.C.

8) Mazeaud, t. 3, vol.2, para. 999.

must bear any additional expenses incurred by the former as a result of such change.(9) In English Law, it seems that there is no authority in the case law supporting this rule; and it has been suggested that the question whether or not the place of payment is changed in these circumstances should depend upon a reasonable inference, to be drawn from all the circumstances surrounding the formation and the performance of the contract.(10)

If, on the other hand, the buyer is bound to pay the price against handing over the goods or documents, he must pay it at the place where such handing over takes place.(11) Whether payment is to be made against goods (or documents) is again subject to the parties' intention; otherwise, it seems that the general rule as described above applies. It has rightly been noticed,(12) however, that this provision is tautology; for it is granted that the place of payment and that of handing over the goods (or documents) must necessarily be the same whenever payment is to be made against such handing over.

10. Time of payment

Art 71 of ULIS provides that:"Except as otherwise provided in Article 72, delivery of the goods and payment of the price

---

9- 9) Arts. 59.2 of ULIS & 57.2 of the Convention. See also s.348.1 of CITC where a similar principle is adopted therein.

10) Benjamin, para.705.

11) Arts.59.1 of ULIS and 57.1 of the Convention.

12) A/CN.9/87, annex,4, para.6.

shall be concurrent conditions". And Art. 72.1 provides, inter alia, that:(1) "Where the contract involves carriage of the goods and where delivery is, by virtue of paragraph 2 of Article 19, effected by handing over the goods to the carrier, the seller may... postpone the despatch of the goods until he receives payment."

The expression "concurrent conditions" in the former provision,(2) which is not defined by ULIS, seems to indicate that: firstly, payment must be made at time of delivery(3) and, secondly, either party is entitled not to perform until and unless he receives the other's performance.(4) Both principles are well-admitted in French Law.(5) It is suggested, on the other hand, that the phrase "delivery of the goods" includes delivery of documents controlling their disposition as well.(6)

10- 1) See further para.169, post.
2) See also s.361.1 of CITC in which payment and delivery "must take place simultaneously".
3) Cf,ss.2-310(1) of UCC and 5.8(1) of DUSA; in both payment is due "at the time at which the buyer is to receive the goods even though the place of shipment is the place of delivery".
4) A/CN.9/87,annex 4, para.7;see also Document V/Prep.1 in Hague Conference, vol. 2, p38, which is the same under CITC(s.361.3)
5) As to the first principle, see Article 1651 of C.C;Mazeaud, ibid,para.997. As to the second principle, see Article 1612 of C.C; Mazeaud, ibid, para.1007; see further para.167,post.
6) See also s.361.2 of CITC where a particular reference is made to such documents.

One may well say, therefore, that ULIS does not consider, as a rule, payment of the price a condition precedent to delivery. This view may also be supported by the opening phrase of Art. 71 which considers the provision laid down in Art. 72 above as an exception to the "concurrent conditions" rule; and payment under Art. 72.1 is a condition precedent to delivery which is effected in these circumstances by handing over the goods to a carrier for transmission to the buyer.

Likewise, under s.28 of the SGA delivery and payment are "concurrent conditions" in the sense that the buyer and seller must be ready and willing to make payment and delivery respectively. The question of readiness and willingness is substantially a question of fact.(7) In this respect, it has been suggested that payment becomes due when the seller informs the buyer that he is ready and willing to effect delivery.(8)

However, the term "concurrent conditions" was intentionally excluded from the Convention because, as has been said, it is a legalistic concept not readily understandable by merchants or even by lawyers from different legal systems.(9) Instead, Art. 58.1 provides that: "If the buyer is not bound to pay the price at any other specific time, he must pay it when

---

10- 7) Levy & Co. v. Goldberg [1922] 1K.B.688, 692.

8) Benjamin, para. 713.

9) A/CN.9/87, annex 4, ibid. But see Arts.81.2 (post, para. 83) and 85 (post, para. 182) of the Convention where the word "concurrently" has been used in both.

the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents".

This provision is quite plain to the effect that: firstly, payment of the price must be made at the time of placing the goods (or documents) at the buyer's disposal; and, secondly, such payment is a condition precedent to handing over the goods (or documents) to the buyer.(10) The phrase "places the goods... at the buyer's disposal" does not mean, as submitted, other than "delivery" as provided for in Art. 31(b) and (c) where the same phrase has been used in defining delivery when the sale does not involve carriage of goods.(11) If this is correct, it means that Art. 58.1, like Art. 71 of ULIS, only faces the situations envisaged by Art. 31(b) and (c). Nevertheless, it may be that similar principles apply, by analogy, to the situation stated in paragraph(a) of the same Article under which delivery, where the sale involves carriage of goods, is effected by handing over the goods to the first carrier for transmission to the buyer. In such an event,

---

10- 10) But **cf.**, A/CN.9/125 and add.1-3(Finland para.12) where it was suggested that the second sentence of art.36.1(ie,58.1) should be deleted on the ground that that sentence added nothing to the first sentence.

11) In this connection, it may be interesting to note that the phrase "hand over" appeared in an earlier stage of drafting the relevant text, but it was then replaced by "place the goods at the buyer's disposal"; the clear purpose for this change was to bring the text in line with art.21(ie, 31) of the (draft) convention, see A/CN.9/87, paras.29,35

therefore, payment must be made on the date fixed for despatching the goods, and the seller is entitled not to despatch until he receives payment.

But placing the goods (or documents) at the buyer's disposal must be in conformity with the contract and the Convention. Otherwise, the seller cannot rely on the buyer's failure to perform to the extent that such failure is due to the former's act or omission.(12)

By way of summary, the following points must be emphasized.

Firstly, the expression "concurrent conditions" in ULIS may be liable in practice to different interpretations, especially in those legal systems to which this expression is not familiar.

Secondly, under the Convention, payment of the price is a condition precedent to despatching the goods or handing them over to the buyer as the case may be; while it is so under ULIS only in the former situation on the assumption that the contract does involve carriage of the goods.

Finally, under both laws, the seller is not bound to grant the buyer any credit for payment, however short, which is also the approach of Common Law in interpreting the term "concurrent conditions".(13)

10- 12) See post, para. 159.

13) See OLRC Report, vol. 2, p 350.

11. Payment before examination

As a rule, the buyer is not bound, under ULIS and the Convention as well,[1] to pay the price until he has had the opportunity to examine the goods to ascertain whether the seller has performed his obligation as to conformity of them. Accordingly, it may be that the latter cannot claim payment before giving the buyer such opportunity which is presumed to be reasonable in the circumstances. The question of examining the goods is outside the scope of this study; but it is important to note here that the buyer is obliged to make payment even before having any opportunity to examine the goods if, in the language of ULIS, the contract requires payment against documents[2] or, in the words of the Convention, the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.[3] The most obvious illustration of this is the case in which payment is to be effected against documents during the transit.In such a case, the buyer cannot defer payment until he receives the goods on the ground that he has not previously been given the opportunity to examine them.[4]

11- 1) Arts.71,72 of ULIS; Art.58.3 of the Convention. A similar principle is provided for in CITC (s.361.1).

2) Art. 72 of ULIS, which is the same under CITC (s.361.2).

3) Art.58.3 of the Convention.

4) There was a suggestion to add "payment against documents"to the text, but that suggestion was opposed on the ground that the current language (of the convention) covered such situation, see successively A/CN.9/100, annex 2(Bulgaria,para.15; Norway, art.59 bis); A/CN.9/100, paras.86-87.

But it is important to bear in mind that the Convention is not completely in line with ULIS. What is crucial under the former is not whether payment is to be made against documents, which is the case under the latter, but rather whether the "procedures for delivery or payment are inconsistent" with examining the goods prior to payment. It is true that the Convention does not set forth which procedures are inconsistent with such right; and it is also true that the above setting is the most common example in practice(5) on which both laws seem to be in agreement. But in some cases, payment against documents is not necessarily inconsistent with the right of examining the goods prior to payment. This is in particular the situation in which such payment falls due after receiving the goods by the buyer where examining them becomes available to him before making payment. In this case, it may well be that he is not bound, under the Convention, to make payment before having the opportunity of examination(6) while the approach of ULIS is (apparently) different since the only criterion for depriving him of this right, ie, payment against documents, is met.(7)

11- 5) A/CN.9/116, annex 2, comment on art.39, para. 6; A/CONF.97/5, comment on art.54, para. 7.

6) Which is the clear approach of both UCC:s.2-513(3)(b) and DUSA:s.7.12(4)(b); see also A/CN.9/116, para.7; A/CONF. 97/5, para. 8.

7) See, however, A/CN.9/87, annex 4, paras.19-20 where it is said that it seems difficult to work out a satisfactory solution for this standard situation under ULIS.

Moreover, it seems that the buyer cannot refuse making payment on the ground that he has not been given the opportunity of examining the goods if those goods have been lost in transit but after the passage of the risks;(8) this is so, it is submitted, even where payment is not to be made, in ULIS, against documents or where the procedures for payment, under the Convention, are not originally inconsistent with examination before making payment.

Finally, the above criterion under the Convention depends merely upon the agreement of the parties. Nevertheless, it is important to remember Art. 9 which expressly states two basic principles; the first is that the parties are bound by any usage which they have agreed upon and by any practices which they have established between themselves; the second is that they are considered, subject to certain requirements, to have impliedly made applicable to their contract a usage which is widely known in international trade.

12. Payment without request

Art. 60 of ULIS provides that:"Where the parties have agreed upon a date for the payment of the price or where such date is fixed by usage, the buyer shall, without the need for any formality, pay the price at that date."

While Art 59 of the Convention provides that:"The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or compliance with any formality on the part of the seller."

11- 8) See post, para. 133.

The significance of these provisions becomes clear when comparing them with Civil Law or, more precisely, with French Law in particular. Under this law,(1) the general rule is that the creditor may not resort to any remedy on the ground of the debtor's delay in performance until he puts him in default (mise en demeure). The "mise en demeure", in which the creditor demands his debtor to pay, takes the form of a notice or any other equivalent form including a summons (citation en justice).

This is not the approach of either ULIS or the Convention where it is quite clear from the above provisions that the buyer is bound to make payment without the need for serving him a summons or otherwise. The result of this approach is that the buyer becomes in default once the date of payment passes without making such payment and, accordingly, the seller's remedies become available forthwith. Nevertheless, it is important to note that the remedy of avoidance, where the breach is not fundamental, may not be available unless the buyer fails to comply with a reasonable notice of performance given to him by the seller.(2) To a great extent, the position of English Law is similar to this approach. **In the first place, it seems that there is no authority supporting the idea that** giving the buyer a notice of performance or otherwise is a condition precedent to the availability of the seller's remedies. If, in the second place, time of payment is not of

---

12- 1) See Article 1139 of C.C; Starck, Droit Civil(Obligations), 1972, paras. 2035 ff, 2175.
2) Post, para. 38.

the essence of the contract, which is the general rule, the seller cannot resort to avoidance unless:-firstly, he gives the buyer, after undue delay in making payment, an additional time notice; secondly, this notice has expired "without complying with it.(3)

Read literally, however, the provision of ULIS is confined to the case in which payment is to be made on a date fixed. If, therefore, the contract calls upon the buyer to effect payment during a period of time as, for instance,during May, the provision does not apply. But doubts may be expressed as to whether this understanding is intentionally intended. The reference to usage, on the other hand, seems to be superfluous where the parties, by virtue of Art. 9 of ULIS, are originally bound by usages; and that is, perhaps, the reason why the relevant text of the Convention does not make any reference to usage.

12- 3) Post, para. 39.

CHAPTER I:

AVOIDANCE OF CONTRACT

Introduction

13. Meaning in general

The term "avoidance" as used in both ULIS and the Convention means, in general,[1] that right which is given to the injured party, say the unpaid seller, to put an end to the contract upon the buyer's failure to make payment if certain requirements are satisfied.[2] Avoidance may be total or partial depending upon the case; contrary to the former, it does not relate, in the latter, to the whole contract but to such part of it which has been affected by the breach.[3] In both cases, however, the remedy of avoidance is not directed to the goods but to the contractual relationship itself.[4] The question of possession of, or property in, the goods is irrelevant; thus, the unpaid seller may be entitled to avoid the contract even if both possession and property have already been vested in the buyer,[5] or even if the goods have lost or deteriorated while they were in the hands of the buyer.[6]

13- 1) As to ipso facto avoidance in ULIS, see post, paras.48 ff.
2) Avoidance in both laws should be based on either the fundamental breach (post, paras.17 ff) or the additional time notice (post, paras.34 ff).
3) Post, paras. 78 f.
4) See, however, Baer, Seller's Remedies (MS), p 104 where the avoidance has been considered a remedy in rem.
5) Cf, in English Law, post, para. 80.
6) Post, para. 86.

14. Terminology

In English Law, the terms "discharge"[1] by breach or from further performance, "termination",[2] "cancellation",[3] "rescission"[4] and others[5] have all been used to cover the meaning of avoidance as referred to above; while in French Law, it seems that the only expression used in this respect, following the Civil Code approach,[6] is "résolution". If, however, the avoidance relates to what so-called "contracts successifs",[7] it is familiar to refer to "résiliation" rather than "résolution". So that, neither ULIS nor the Convention has faced any difficulty of terminology when drafting the French texts where both have used the term "résolution". But in the English texts, the

---

14- 1) Eg, Johnson v. Agnew [1980] A.C. 367, 392.

2) Eg, Wickman Machine Tool Sales Ltd. v. L.Schuler A.G. [1974] A.C.235,264.

3) Eg, The Mihalis Angelos [1971] 1 Q.B.164,199 (a contractual term); Millar's Karri and Jarrah Co. (1902)v. Weddel,Turner and Co.(1908) 14 Comm. Cas.25,29; Panoutsos v. Raymond Hadley Corp. of N.Y. [1917] 2 K.B.473.

4) Eg, Alexander v. Railway Executive [1951] 2 K.B.882,889. Moschi v. Lep Air Services [1973] A.C.331,349; Suisse Atlantique Societe d' Armement Maritime S.A. v. N.V. Roterdamsche Kolen Centrale [1967] 1 A.C.361,367. This expression has also been used under s.48 of the SGA. As to a criticism of such usage in general see Cheshire, Fifoot and Furmston, p 491.

5) Eg, Bradford v. Williams(1872)7 L.R.Ex.259,261 (to declare the contract as at an end); see, also, Photo Production Ltd. v. Securicor Transport Ltd. [1980] . A.C. 827,844.

6) Arts. 1183, 1184 (general rules of obligations) & Arts.1654 ff (contract of sale).

7) Post, para 70.

expression "avoidance" has been used thereunder though this expression is not familiar to Common Lawyers.(8)

15. Sources of provisions

The machinery of avoiding the contract in ULIS owes, as said, nothing to French Law,(1) and the same may be true with relation to the Convention. The provisions of avoidance under both include, as will be seen later, the doctrines of fundamental breach, additional time notice, anticipatory breach and instalment contracts. In addition, the avoidance is exercised by the unilateral will of the aggrieved party without the interference of the court. In fact, all these ideas are generally familiar to Common Law rather than Civil Law.

The situation in respect of the effects of avoidance is quite different. As a rule, the avoidance under ULIS and the Convention operates retrospectively, which is broadly the position of French but not English Law.(2) If, however, the contract is by instalments, the avoidance does not generally affect previous deliveries nor any other right which has already matured before the avoidance takes place. A similar principle is clearly recognized by English Law and, to some extent, by French

---

14- 8) See further A/CN.9/62, annex 2,para.38 where doubts had been expressed whether the term "avoidance" was the appropriate one in English or either "termination"or "cancellation"; see also A/CN.9/W.G.2/W.P.16,para.38; Document V/Prep/8, in Hague Conference, vol. 2, p 236(the view of US' representative).

15- 1) Treitel, Remedies for Breach of Contract, in Int.Enc. of Com. Law, vol. 7, ch. 16, s. 144.

2) Post, this Ch., s.V.

Law as well.

In short, one may well say that the provisions concerning the process of avoidance are mainly derived from Common Law system, while those relating to its effects have certain parentage in both Civil and Common Law.

16. Division

Under this chapter, the questions relating to the remedy of avoidance will be examined under five sections as follows:

Section I : Fundamental Breach

Section II : Additional Time Notice

Section III : Mechanism of Avoidance

Section IV : Avoidance in Particular Cases

Section V : Effects of Avoidance.

Section I

Fundamental Breach

1. In general

17. Texts

Art. 62.1 of ULIS provides that:

"Where the failure to pay the price at the date fixed amounts to a fundamental breach of the contract, the seller may ... declare the contract avoided"; and Art. 10 provides that: "For the purposes of the present Law, a breach of contract shall be regarded as fundamental wherever the party in breach knew, or ought to have known, at the time of the conclusion of the contract, that a reasonable person in the situation as the other party would not have entered into the contract if he had foreseen the breach and its effects".

While Art. 64.1 of the Convention provides that:

"The seller may declare the contract avoided... if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract ...";(1) and Art. 25 provides that: A breach of contract committed by one of the parties is fundamental if it

---

17- 1) For a legislative background of the text, see the following documents successively: A/CN.9/87, annex 4, paras. 22 ff, and paras. 40 ff of the original document; ibid., annex 1, art.72 bis; A/CN.9/100, annex 1, art.45 (72 bis); A/CN.9/116, annex 1 (art. 45); A/32/17, annex 1, paras. 380 ff, and para. 35 (art.46) of the original document; A/33/17, para. 28 (art.60); A/CONF.97/19, pp 123 (art.57), 371 (para. 64b), 162(art.60) and 312 (para. 51).

results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such detriment."(2)

18. Criticism of ULIS

The definition of fundamental breach under ULIS has been liable to various criticisms.(1) It has been said, for example, that this definition is too complex(2) and is based on a hypothetical situation;(3) therefore, it would be difficult to apply.(4) Moreover, its application does not depend upon objective factors but, rather, upon the subjective judgment of the parties.(5) Finally, the words used in the definition would lead to different interpretations by courts in different countries.(6)

In brief, the whole definition of ULIS was unsatisfactory

17- 2) For a legislative background of the text, see the following documents successively:A/CN.9/52, paras.83 ff; A/CN.9/100, paras.43 ff; ibid, annex 1, art.9(10); A/CN.9/116, annex 1 (art.9);A/32/17,annex 1, paras.88 ff, and para.35 of the original document (art.8); A/33/17, para.28 (art.23). A/CONF.97/19,pp 98 f (art.23), 295-303,329-330,157 (art.23) and 206 (paras.12 ff).

18- 1) See generally Eorsi, 31 A.J.C.L. 1983, p 333, 339; Graveson and Cohn, pp 55 ff; A/CN.9/W.G.2/WP.9, paras. 32 ff.

2) A/CN.9/52, para. 87.

3) Graveson & Cohn, p 55; Honnold, Uniform Law, para.182.

4) A/CN.9/100, annex 3, para. 67.

5) A/CN.9/WG.2/WP.9, para. 34; A/CN.9/31, para. 86.

6) A/CN.9/52, para. 86; see also A/CN.9/100, ibid.

to the draftsmen of the Convention.(7) After excessive and difficult discussions,(8) the above definition under the Convention has been adopted which is, also, not free from criticisms nor from difficulties in practice.(9)

19. English and French Law

However, the doctrine of fundamental breach, so far as the avoidance of the contract is concerned,(1) is well-recognized in Common Law system.(2) According to which, breaches of contract are of two types.(3) The first, while it is not so serious, may enable the aggrieved party to claim damages but

---

18- 7) See, however, the view of Bulgaria, in A/CN.9/100, annex 2, para. 4, and of UK's representative at UNCITRAL, in A/CN.9/WG.2/WP.6, para. 69.

8) See the documents cited in para. 17, note 2, supra, particularly A/CONF.97/19, pp 295-300, 329-330.

9) Post, paras. 23 f.

19- 1) This doctrine is also connected with "ex-emption clauses"; for illustrations of this from recent cases, see Photo Production Ltd. v. Securicor Transport Ltd. [1980] A.C.827; Suisse Atlantique Societe d' armement Maritime S.A. v. Rotterdamsche Kolen Centrale [1967] 1 A.C.361.

2) See further post, paras.26 ff. It is to be noted that a similar principle is also provided for in CITC (ss 235 f: "essential breach"). But it seems that neither UCC nor DUSA has adopted the doctrine of fundamental breach as such.

3) See, for example, Decro-Wall International S.A. v. Practitioners in Marketing Ltd. [1971] 2 All E.R. 216,221; Photo Production case,supra, 849; Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B.26, 71-73;Wickman Machine Tool Sales Ltd.v.L.Schuler A.G. [1974] A.C.235,264.

not to avoid the contract. The other, which has been described particularly in recent cases as "fundamental",(4) does not mean either more or less than the well-known type of breach which entitles the innocent party to treat it as repudiatory and to avoid the contract;(5) or, in other words, it is a breach which goes to the root of the contract and, accordingly, the innocent party is entitled to regard it as a repudiation of the whole contract.(6)

The principle of fundamental breach is likewise known, to some degree, in French Law.(7) For example, when the seller is in default, the buyer can go to the court to demand avoidance if the former's bad or partial performance affects an <u>essential</u> element of the contract.(8) Moreover, it will be seen below that the court before granting a decree of avoidance takes into account the degree of breach. Nevertheless, it may well be that this doctrine as a whole is not familiar to French Lawyers and may-be to Civil Law in general;(9) nor does French C.C. require for avoiding the contract that the breach must, as a rule, be fundamental. The whole process of avoidance in French Law is, however, completely different from that followed in Common Law; this will be considered in the next paragraph.

19- 4) E.g., <u>Moschi v. Lep Air Services</u> [1973] A.C. 331, <u>Photo Production case</u>, <u>supra</u>, 489; <u>Suisse case</u>, <u>supra</u>, 397, 421.

5) <u>Suisse case</u>, <u>supra</u>, 397.

6) <u>Ibid</u>., 421-422.

7) Treitel, <u>Remedies</u>, s.161.

8) Houin, 1964 <u>ICLQ</u>, Supp. Pub. 9, p 16, 26.

9) The whole concept of "fundamental breach" is unacceptable, as has been said, to the most legal systems of the "continential" type,see A/CONF.97/19 p 206, para. 15(Garrigues of Spain).

20. Decision of avoidance

The general rule prevailing in French Law is that avoidance of the contract on the ground of breach must be sought in justice,(1) i.e, before the court according to normal judicial procedure. Therefore, declaration of avoidance by the unilateral will of the non-defaulting party has no legal effect. In fact, the court is empowered to award avoidance or, on the contrary, to grant the debtor a period of grace for performance;(2) its discretion also includes awarding partial avoidance instead of avoiding the whole contract.(3) In all cases, the court takes into consideration all surrounding circumstances including of course the degree of breach.(4) Further, French jurisprudence requires before awarding avoidance that the breach must be serious; whether it is so is again a matter to be decided by the court.(3)

Indeed, this is not the case in English Law in which it seems to be settled that the decision of avoidance is the act of the parties or one of them, and not that of the court.(5) Moreover, it may be that the court has no discretion, at least in theory, in the matter; its role seems to be confined to

---

20- 1) Article 1184 of C.C. But this rule is subject to certain exceptions, see Marty et Raynaud, Droit Civil, t.2, 1962, paras. 296, 305.
2) Article 1184 of C.C.
3) Marty et Raynaud, para. 300.
4) Treitel, Remedies, s. 147.
5) See Beale, Remedies for Breach of Contract, 1980 , p 67 ; Treitel, ibid.

ascertaining whether the breach, according to the appropriate test, justifies avoidance; if so, then it must confirm the decision of avoidance which is presumed to have already been taken by the innocent party.

The approach of ULIS and the Convention is similar to that followed in English Law. Apart from ipso facto avoidance under the former,(6) the provisions of both laws are clear to the effect that the avoidance should be made by a declaration to be taken by the innocent party, otherwise the contract remains alive.(7) There is no indication in either that the court has a decision in the matter.(8)

21. Parties' agreement

On the other hand, it may well be that the distinction between fundamental and non-fundamental breach in ULIS and the Convention has no value when the avoidance is based upon a contractual power. For example, the contract may give the seller the right to avoid the contract if the buyer fails to make payment exactly on the fixed date, or to comply with the

---

20-

6) Post, para. 48.

7) Post, paras.55 ff; see also Mazeaud, t.3, vol. 2,para.1011 (ULIS); Kahn 33 Rev. Int. Dr. Com. 1981, p 951,978 (Convention:Seller's avoidance);Cumming, 9 Cal.W.Int.L.J. 1979, p 157,175 (UNCITRAL draft convention). A similar principle seems to be applied in CITC (s. 235.1).

8) In addition, the principle of "period of grace" in French Law is expressly rejected by both laws (post, para.135).

method of payment so specified. In these cases and the like, the question which may arise is not whether or not the buyer's breach is fundamental but, rather, whether such agreement is valid and, if so, whether the breach so defined has taken place.

In fact, there is no provision to that effect in either ULIS or the Convention; instead, both provide that the parties are free to exclude (or vary) any of their provisions.(1) The application of this rule, which has no exception whatever under the former, is subject, under the latter, to another provision which is irrelevant here.(2) This does not mean, however, that the parties' agreement is valid; the question of validity of any contractual term is outside the scope of either.(3) It only

---

21- 1) By virtue of Arts.6 of the Convention and 3 of ULIS which adds that the parties' agreement may be express or implicit. However, German judges often refused, as said, to recognize tacit exclusion of ULIS in order to save the Law (Bonell, p 7 , 12); for an illustration of this approach, see Oberlandesgericht Hamm, 3.X. 1979, 20 U 98/79, quoted in UNIDROIT (1980) vol. 1, p 318. But in another case it was held, also in W. Germany, that the parties might exclude the application of ULIS even as late as during court proceedings (quoted in 9 European Law Report, 1981, p 343).

2) I.e.,Art. 12 of the Convention which expressly provides that the parties may not derogate from or vary the effect of it.

3) According to Arts.8 of ULIS and 4(a) of the Convention; but cf., post, para.149.

means that the fundamentality of breach in respect of avoidance becomes immaterial provided that there is an agreement to the contrary and, further, that such an agreement is valid according to the proper law of the contract.

In this context, the clear position of English Law is that the parties' agreement as to avoidance is respected. If, therefore, the contract so provides, the innocent party may avoid it even if the other's breach is considered to be so slight in normal circumstances.(4) A similar principle seems to be generally admitted in French Law.(5) Nevertheless, there are remarkable differences between the two laws.

Firstly, in English Law the avoidance in such a case is orginally based upon dividing the contractual terms into "Conditions" and "Warranties".(6) Any term belonging to the

---

21- 4) See, for example, Hong Kong Fir Shipping Co. Ltd. v. Kawaski Kaisen Kaisha Ltd. [1962] 2 Q.B.26,63; The Mihalis Angelos [1971] 1 Q.B.164,193 (breach of a condition); Photo Production Ltd. v. Securicor Transport Ltd. [1980] A.C.827,848-849; Suisse Atlantique Societe d'armement Maritime S.A. v. Rotterdamsch Kolen Centrale [1967] 1 A.C.361,421-422; see also Lord Devlin, 1966 C.L.J. p 192,198-199 (breach of a fundamental term).

5) Marty et Raynaud, para.306; Mazeaud, t.3, vol.2, para.1011; Planiol et Ripert, t.10, para.165. As to the exceptions to this rule, see Marty et Raynaud, para.307.

6) This is also recongnized by the SGA (s.11.3); so it has become, as has been said, a general but not a universal feature of the English Law of contract (Cheshire, Fifoot and Furmston, p 132).

former has been described as an "essential"(7) or a "fundamental"(8) term in the contract. The breach of which, therefore, enables the victim to avoid the contract(9) while the breach of a "warranty", which is regarded as a collateral(10) matter in the contract, may entitle him to claim damages but not to avoid the contract.(11) Whether a term is a "condition" or "warranty" depends, in the absence of the parties' intention,(12) upon the true construction of the contract in the light of all surrounding circumstances.(13)

This dichotomy of contractual terms is not known in French Law. The practical importance of such a difference is that it is sufficient, under English but not French Law, that the contract states that a particular term is a "condition" or "warranty" in the above meaning; in such an event, it becomes known in advance whether or not its violation justifies the

---

21- 7) Lord Devlin, p 192.

8) Suisse Case, supra, 422; but cf, Lord Devlin, p 204.

9) See, for example, Bentsen v. Taylor (1893)2 Q.B.274,280-281; Suisse case, ibid; The Hansa Nord [1976] Q.B.44, 59; The Mihalis Angelos [1971] 1 Q.B.164, 193.

10) S. 61.1 of the SGA.

11) See, for example, Bentsen case, ibid; The Hnsa Nord, ibid; see also Lord Devlin, p 191.

12) As well as a statutory provision; see Hong Kong case, supra, 66.It has been held, further, that "if... a provision... has generally been regarded as a condition... it would be regrettable at this stage to disturb an established interpretation" (The Mihalis Angelos, supra, 199).

13) Bentsen case, supra, 281; see also Hong Kong case, supra, 63.

avoidance of contract.(14)

Secondly, the parties agreement in French Law must be express(15) while in English Law it might be implicit.(16)

Finally, even where the avoidance is derived from a contractual power, the avoiding party is not released under French Law(17) from putting the other in default (mise en demeure)(18) unless the contract provides otherwise.(17) There is no similar rule in English Law.

2. Detriment Formula Under Convention

22. Generally

According to the Convention, the buyer's breach is not considered to be fundamental unless it results in such detriment to the seller "as substantially to deprive him of what he is entitled to expect under the contract".(1) Those words were added at the diplomatic Conference whereas UNCITRAL's formula only referred to the "substantial detriment"(2) sustained by

---

21- 14) It is to be noted, however, that this dichotomy is not exhaustive (post, para. 26 ff).

15) Marty et Raynaud, para. 306; Mazeaud, t.2, vol. 3 para.1011; Planiol et Ripert, t.10, para. 165.

16) Hong Kong case, supra, 63, Photo Production case, supra, 849; Suisse case, supra, 422, see also Lord Devlin, pp 198-199.

17) Mazeaud, ibid; See also post, para. 38.

18) Supra, para. 12.

22- 1) Art. 25 of the Convention, supra, para. 17.

2) Art. 23 of the draft convention.

the seller. But this formula was liable to various criticisms(3) especially on the ground that it included a subjective criterion;(4) accordingly, there was a clear trend to replace it by an objective one(5) and that might be achieved by establishing some kind of link between the detriment and the contract.(6) As a result, the current formula has come into existence.

23. Criticism

So that, the above formula is based upon several factors. Firstly, the buyer's breach must result in detriment to the seller. Secondly, such detriment should be substantial. Thirdly, this substantial detriment should reach a high degree to the extent that it deprives the seller of his expectation. And, finally, such expectation is to be inferred only from the contract itself. This formula as such is, as clear, so complex

---

22- 3) See A/CN.9/126, comments on art.9; the debate of Conference (First Committee) on art. 23, in A/CONF.97/19, particularly pp 299-301, 329-330; Cumming, pp 177 f.

4) A/CONF.97/19, p 299 para. 54 (Szaszy of Hungary), para. 50 (Olivencia Ruiz of Spain) and p 300 para. 32 (Kopak of Czechoslovakia). But cf, ibid, p 300, para. 57 (Ghestin of France); A/CN.9/125 and add 1-3, comment on art.9(Yugoslavia para. 13).

5) A/CONF.97/19, pp 329-300 passim.

6) See the proposals presented by F.R. of Germany and Pakistan, A/CONF.97/19, pp 98, 99; ibid, p 330, paras. 31 (Olivencia Ruiz of Spain) and 36 (Boggiano of Argentina). CF., ibid, p 300 para. 10 (Feltham of UK) and p 330, para. 32 (Kopak of Czechoslovakia).

and vague.(1) In addition, it seems to be impractical; for example, the contract price may be less than the market price and the seller can readily dispose of the subject-matter of the goods for a higher price. In this setting, he cannot resort to avoidance on the ground of fundamental breach even if it is clear that the buyer, who fails to pay in time, would never make payment; nor can he rely on the doctrine of anticipatory breach which is also based, inter alia, on fundamentality of breach.(2) This is simply so because the seller has not, or, at any rate, on the assumption that he has not, sustained any detriment though the buyer's breach has deprived him of all his expectations under the contract.(3)

Suppose, on the other hand, that the court before which the dispute is brought would not allow, by applying its own law, the seller to recover the price.(4) In this case, the seller would be put in a critical position where he can neither avoid the contract nor claim the price.

In brief, it might be more likely had the Convention focused on the aggrieved party's expectations under the contract than on the detriment sustained by him, and this view seems to be in line with recent English cases.(5) In practice,

---

23- 1) See also, ibid, p 329, para. 18 (Szaszy of Hungary); Eorsi, 31 A.J.C.L. 1983, pp 333, 340 ff.
2) Post, para. 63.
3) See also A/CN.9/125 and add.1-3, comment of Czechoslovakia on art. 9, para. 5.
4) Post, para. 139.
5) Post, para. 29.

however, this thorny difficulty could easily be solved, as far as avoidance is concerned, as follows: the seller may give the buyer a reasonable notice of performance; if the latter does not comply with it, the former can avoid the contract where the degree of breach becomes irrelevant.(6)

24. Subjective or objective test?

It seems that the test of detriment includes both objective and subjective elements. The latter is based upon the fact that the (actual) detriment, as described above, is to be suffered by the seller himself. If, for instance, he has not suffered such detriment, the test is not satisfied, even if any other person would have suffered it had been put in the same position and circumstances as the seller. The converse is also true; it is sufficient for satisfying the criterion that the seller has sustained such detriment even if the presumed person would not have suffered it.

The objective element could be inferred from two facts. Firstly, there must be an actual detriment suffered by the seller in consequence of the buyer's breach. Secondly, such detriment, however serious, may only be based upon, or drawn from, the seller's expectations under the contract. Therefore, the test is not considered to be met where either the seller has suffered no detriment or, presumably, such detriment, assuming its occurrence, is inferred from circumstances other

---

23- 6) Post, para. 36.

than the contract.[1] It is true, however, that whether or not the breach results in detriment and, if so, whether such detriment is substantial to the extent described above is subject to the estimation of the court. But in doing so, it may be that the court would confine itself to examining the term of the contract and ignore the circumstances of the case;[2] and this seems to be another gap in the Convention.

In many situations, the contract may not make it clear that one party's breach would result in substantial detriment to the other, but this fact might easily be concluded from surrounding circumstances including of course the contract itself. Suppose, for instance, that the seller has informed the buyer that payment on the date so fixed is of particular importance for him to settle his debts; but this fact has not been inserted in the contract. In such a case, the seller cannot avoid the contract on the ground of fundamental breach. This is not, however, the situation under English Law[3] in which all surrounding circumstances are to be taken into account when deciding whether or not the breach is fundamental.

Nevertheless, it would seem that the court is likely to to take the circumstances of the case into consideration under

---

24- 1) Cf.,Herber of F.R. of Germany whose proposal was the basis of the current text where he considered that the proposal was not to exclude the circumstances of the case(A/CONF. 97/19, p 301, para.78).But see the view of Feltham (UK) and of Lebdev (USSR),ibid, paras.70, 75.

2) See Feltham, ibid.

3) Post, para. 29.

the cover of interpreting both the contract and the relevant text of the Convention. In this connexion, it may be useful to remember that the principle of good faith, by virtue of Art.7 of the Convention, constitutes a basic principle for interpreting any of its provisions.

25. Parties' agreement and objectivity

The objective factor discussed in the preceding paragraph must not be confused with a contractual power given to the seller for avoiding the contract. Both are based on, or inferred from, the contract; but while the former presumes that the buyer's breach results in detriment to the seller, the question of detriment or, more precisely, the whole concept of fundamental breach is irrelevant in the latter.(1)

So, for instance, it might be clear from the contract that non-payment in time would result, according to the proper test, in substantial detriment to the seller. But suppose that such detriment had not, for any reason, taken place in spite of the buyer's breach. In that case, the seller could not rely on the doctrine of fundamental breach for avoiding the contract. If, however, there were an agreement to that effect, avoidance would be justified(2) notwithstanding that no detriment resulted from the breach.

25- 1) Supra, para. 21.

2) On the assumption, of course, that the parties' agreement is valid (supra, para. 21).

3. Innominate terms in English Law

26. New trend

Originally, the remedy of avoidance on the ground of breach in English Law was based on dividing the contractual terms into "conditions" and "warranties".(1) The exhaustive feature of this dichotomy prevailed in the case law until the following principles have been declared:(2)

Firstly, many of the contractual terms cannot be classified as being conditions or warranties.(3)

Secondly, even if a particular term is regarded as a warranty, damages are not necessarily the only sufficient remedy for violating that term.(4)

Finally, the remedies available to the innocent party in this case depend entirely upon the nature of the breach and its foreseeable consequences;(4) or, in other words, upon whether the breach gives rise to an event which will deprive him of substantially the whole benefit which was intended that he should obtain from the contract.(3)

It may well be that the doctrine of fundamental breach is linked, at least at present time, to these principles rather

---

26- 1) Supra, para. 21.
2) Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 26.
3) Ibid, 70.
4) Ibid, 64.

than the duality of conditions and warranties.(5)

This modern phenomenon has been recognized by several subsequent cases(6) and it is well-admitted now that there is a third category of contractual terms, or, at any rate, that the orthodox view of warranty is no more acceptable. This will be considered in the succeeding paragraphs.

27. Relation with warranties

Notwithstanding the recognition of this trend, the question which has not been decisively answered yet is whether the innominate terms are absolutely separate from the above dichotomy, or they constitute part of warranties but the modern trend gives the "warranty" a meaning different from the orthodox view.(1)

26- 5) In Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Central [1967] 1 A.C. 361,421-422 a distinction has been made between fundamental breach and a breach of fundamental term which rather means a "condition" strictly so called.

6) See, for example, Bergerco v. Vegoil [1984] 1 Lloyd's Rep. 440. Bremer Handelsgesellschaft M.B.H. v. Vanden Avenne-Izegem P.V.B.A. [1978] 2 Lloyd's Rep 109, 113; Bunge v.Kruse [1979] 1 Lloyd's Rep. 279,290-291 where Bermer case was applied; Bunge Corporation v. Tradax Export S.A. [1980] 1 Lloyd's Rep.294,303;Federal Commerce and Navigation Co. Ltd. v. Molena Alpha Inc. [1979] A.C.757,783;The Hansa Nord [1976] 1 Q.B.44; The Mihalis Angelos [1971] 1 Q.B.164,193; Moschi v. Lep Air Services [1973] A.C.331,349;Readron Smith Line Ltd. v. Hansen-Tangen [1976] 1 W.L.R.989,998; Tradax International S.A. v. Goldschmids S.A. [1977] 2 Lloyd's Rep. 604; Wikman Machine Tool Sales Ltd. v. L.Schuler A.G. [1974] A.C. 235,264.

Certainly, the effects of either are, at least in theory, different from the other.

Adopting the former possibility means that the court must first ascertain whether or not the violated term, on the assumption that it is not a condition, is a warranty. If so, the only remedy available to the innocent party is damages and, therefore, he cannot avoid the contract. If not, this means that such a term is classified as an innominate term where the remedies resulting from its violation depend upon the gravity of breach and its consequences; in a given case, he may be entitled to resort to both damages and avoidance while in others he may have the right to a claim for damages but not to resort to avoidance.

But adopting the other possibility leads to the conclusion that the first step for determining the remedies available to the aggrieved party is not the strict distinction between conditions and warranties, but rather whether or not the violated term is a condition. If not, remedies for breaking such a term, whether it is then called warranty or otherwise, depend from the beginning on the nature and effects of breach.

28. Two different views

In solving this problem , one may well say that there are two different views. The first considers that there is a third category of contractual terms which are neither conditions nor

---

27- 1) See Benjamin, para. 758.

warranties. The existence of this category, which may be called intermediate terms,(1) does not therefore affect the orthodox dichotomy.(2) Indeed, this view is apparently supported by the SGA itself under which the distinction between a condition and warranty is expressly recognized. By virtue of s.11.3, whether a stipulation in a contract of sale is a condition, the breach of which may(3) give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may(3) give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract; and a stipulation may be a condition, though called a warranty in the contract.

The second view tends to give the term "warranty" a meaning other than that which prevailed in the law until about the last twenty two years.(4) For example, in the leading case of Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.(5) it has been considered that it would be unsound and misleading to conclude that the term broken being a warranty, then a claim for damages is necessarily a sufficient remedy.(6) In another

---

28- 1) Terminology used in Bremer case, supra, 113; Bunge Corporation case, supra, 303.
2) See, for example, Hong Kong case, supra, 69-71; Wickman case, supra, 264.
3) See the comment of Atiyah on this word, p 46.
4) Ie, until the Hong Kong case, supra.
5) [1962] 2 Q.B. 26.
6) Ibid, 69-70.

case, the key question was whether the term broken was a condition or, simply, an intermediate term.(7) It has also been held that the court must first determine whether the violated term is a condition, and, if not, then it must look to the extent of breach.(8) Finally, this view seems to be supported by some English Law writers.(9)

29. Appropriate criterion

The fundamental breach, or say the modern trend recognizing the existence of innominate terms, turns on the gravity of breach, its nature and (or) consequences.(1) Thus, the non-defaulting party is entitled to avoid the contract whenever the breach is serious, substantial(2) or material(3) to the extent that it goes to the root of the contract;(4) or, in other words,

---

28- 7) Bunge Corporation case, supra, 300.
8) The Hansa Nord, supra, 60, but see p 61 where it was considered that the term "Shipped in a good condition", which was the crux of the case, was not a condition strictly so called nor a warranty strictly so called, but an intermediate stipulation.
9) Atiyah, p 46; Reynolds in Benjamin's Sale of Goods, para.758.

29- 1) Bremer case, supra, 113; Readron case, supra, 998; see also Hong Kong case, supra,64. See, however, Bennett (of Australia at the Conference), A/CONF.97/19, p 298, para. 29.
2) Tradax International case, supra, 604.
3) Wickman case, supra, 264.
4) The Hansa Nord, supra, 60-61; Suisse case, supra, 421-422.

when the breach deprives him of substantially the whole benefit which was intended to be obtained from the contract.(5) Whether the breach is so seems to be a question of fact to be decided in the light of all surrounding circumstances including the contract provisions(6) and, presumably, the detriment sustained by the aggrieved party.

This criterion as such shows two notable differences in contrast with the Convention which:- firstly, concentrates upon the detriment rather than upon the expectations under the contract and, secondly, ignores, as already suggested, the circumstances of the case.(7)

4. Foreseeability

30. Generally

Under both ULIS and the Convention the breach is not considered fundamental unless the test of foreseeability through the defaulting party's angle is met.(1) This test has also

---

29- 5) Hong Kong case, ibid; Photo Production Ltd. v. Securicor Transport Ltd. [1980] 2 W.L.R. 283, 294; Lep Air Services Ltd. v. Rolloswin Investments Ltd. [1973] A.C. 331, 349.
6) Suisse case, ibid.
7) Supra, para. 24.

30- 1) See the text of both, supra, para.17; this test is also provided for under CITC (s.236). See , however, the opinion of Philippines which opposed the whole test, in A/CN.9/125, and add 1-3 (Philippines, comment on art.9); but cf.,Michida, 27 A.J.C.L. 1979, p 279, 284.

been referred to in English case law without giving any further details.(2) Under ULIS, moreover, the whole structure of fundamental breach is basically based upon the test of foreseeability and this is quite clear from Article 10 above.(3)

As to wording, the Convention uses the words "foresee" and "foreseen" to establish the proper test while ULIS uses the phrase "knew or ought to have known..." for the same purpose.(4) However, the latter also uses the word "foreseen" through the aggrieved seller's angle; that is to say, the buyer's actual or presumed knowledge is (to be) focused on the seller's foreseeability of the breach and its effect.(5)

Finally, it may well be that ULIS does not mean by the word "knew" or the like other than the "foreseeability" test though it seems to be more accurate in these circumstances to talk about "foreseeability" rather than "knowledge".

31. Whose foreseeability?

Under the Convention, the foreseeability test is considered to be satisfied when either the buyer himself has (actually) foreseen the result of his breach or a reasonable

---

30- 2) Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. [1962] 2 Q.B. 26, 64:"... the remedies depend entirely upon the nature of the breach and its forseeable consequences"; see also Lord Devlin, 1966 C.L.J., pp 192,194 f.

3) Supra, para. 17.

4) In CITC, too, a similar phrase has been used (s.236):" ... knew or must have known"

5) Para. 32, below.

person of the same kind to be put in similar circumstances would have foreseen it.(1) It is quite plain that the test as such is of objective nature since it does not turn merely on the buyer's own judgment.(2)

On the other hand, it may be that the burden of proof concerning the criteria for foreseeability is rested with the defaulting buyer. This is so although a particular reference to this effect, while discussing the relevant text of the Convention, was expressly excluded(3) and notwithstanding the fact that the question of proof is generally(4) outside the scope of both ULIS and the Convention. In fact, the formula as approved by the W.G. was to the following effect"... and the party in breach foresaw or had reason to foresee such a result".(5) But it was noted that that formula was unsatisfactory because in cases of litigation the burden of proof would be on the innocent party and this could not be considered a proper solution.(6) Accordingly, UNCITRAL adopted the following formula: "...unless

---

31- 1) Art.25, supra. para. 17.
2) See further the debate of the Conference, A/CONF.97/19, particularly Shafik's view (of Egypt) whose proposal was the basis of the current formula (p 295, para.3). See, however, Michida, 27 A.J.C.L. 1979, pp 279, 282-283 who argued that the formula as adopted by the W.G.(below) was subjective.
3) A/CONF.97/19, pp 99 (the proposal) and 294 ff (debate on it).
4) There are certain exceptions to this rule; for an example of this, see para. 152, post.
5) Art. 9 in A/CN.9/116, annex 1.
6) A/32/17, annex 1, para. 89.

the party in breach did not foresee and had no reason to foresee such a result."(7) So that, the clear reason for replacing the word "and" by "unless", which appears in the current text, was to place the onus on the defaulting party.

It is to be observed, further, that the reference to the (presumed) reasonable person is not an alternative to the buyer's (personal) view relating to foreseeability; rather, the two elements are complementary and indivisible.(8) Prima facie, therefore, the breach is deemed to be fundamental once it results in such detriment to the seller; and the buyer who alleges otherwise must prove that the result of his breach was not (actually) foreseen by him nor a reasonable person of the same kind, had been put in the same circumstances, would have foreseen such a result.

Despite the difference in wording, it seems that ULIS, on the assumption that the reference to the buyer's knowledge or the like rather means the foreseeability,(9) follows a similar approach. As has been seen,(10) Art. 10 consideres the buyer's breach fundamental when he "... knew or ought to have known..." the effect of such breach; and by virtue of Art. 13 this expression refers to "... what should have been known to a

---

31- 7) Ibid, para.69 (art.8) and para.35 (art.8) of the original document. See also the final text as adopted by UNCITRAL, A/CONF.97/5 (art. 23).

8) A/CONF.97/19, p 298, para. 41 (Shafik of Egypt).

9) Supra, para. 30.

10) Supra, para. 17.

reasonable person in the same situation." Read literally, however, these words may lead to the conclusion that the satisfaction of the test always turns on the view of a reasonable person. If, therefore, a buyer, assuming that he is a prudent (or say is more than a reasonable) man, has foreseen the result of his breach while a reasonable person would not have foreseen it, the criterion is not met. But it is submitted that this theoritical assumption is not intended and, again, no difference in this connexion could be found, at least in practice, between ULIS and the Convention.

Two further points are to be noted. Firstly, elastic words of this type, whether under ULIS or the Convention, would suggest that the **question** mainly depends upon the court's own estimation.(11) Secondly, unlike the Convention, the burden of proof under ULIS is, presumably, rested with the innocent party.(12)

32. Foreseeability of what?

The answer to this question shows a remarkable difference between ULIS and the Convention. Under the latter, as was

---

31- 11) Cf, s.236 of CITC under which the general principle is that "... in cases of doubt, a breach of contract shall not be considered essential"; but see s.350.2 which reads "In cases of doubt, failure to pay the purchase price in time shall be considered as an essential breach of contract."

12) See also Document V/Prep/11 (Austria) in Hague Conference, vol. 2, p 272; Ziontz, NW J. of Int. L. and Bus. (1980), p 129, 154.

indicated, the whole concept of fundamental breach basically turns on such substantial detriment suffered by the injured seller;[1] and to this fact the foreseeability test is linked. In other words, the defence of non-fundamentality of breach may not succeed unless it is proved that the seller's detriment as described above was not, according to the appropriate test, foreseeable.

The position of ULIS is quite different where the foreseeability is addressed to the supposition that a reasonable person in the same situation as the innocent seller would not have entered into the contract had he foreseen the breach and its effects.[2] Indeed, nothing in ULIS' formula in general produces guidelines for determining when the breach is considered fundamental. The definition is not based on the detriment sustained by the seller which is the case in the Convention;[1] nor on the gravity of breach and its consequences which is the position of English Law in respect of innominate terms;[3] nor, finally, on the importance of the contractual term so violated which is also the situation in English Law so far as the dichotomy of conditions and warranties is concerned.[4] In this respect, it has been considered that ULIS' definition simply means that the question would ultimately depend upon the judge's subjective opinion;[5] and if taken literally, such a

---

1) Supra, paras. 22 ff.
2) Art. 10, supra, para. 17.
3) Supra, para. 29.
4) Supra, para. 21.
5) Goldenhielm, 10 Sca. Stud. in Law, 1966, p 10, 26.

definition might make all breaches fundamental.(6)

However, it is worth noting that it has been held, in an Australian case,(7) that:"the question whether a term in a contract is a condition or a warranty, i.e., an essential or a non-essential promise, depends upon the intention of the parties as appearing in or from the contract. The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor."

Without ignoring the fact that Common Law makes a distinction between a fundamental breach and a breach of a"condition" strictly so called,(8) the above principle defining the essentiality is somewhat similar to the definition of fundamental breach under ULIS; and it may even be difficult to find a notable difference between them in practice.

33. Time of foreseeability

It is expressly settled in ULIS that the only relevant time for considering the foreseeability test is that at which

---

32- 6) Perrott, 1 Int. Cont. L. and F. Rev. 1980, p 577, 581.
7) Tramways Advertising Pty Ltd. v. Luna Park (N.S.W.) Ltd. (1938) 38 S.R.(N.S.W.) 632, 641.
8) Supra, para. 26, note 5. See further paras. 21, 26 ff, supra.

the contract was concluded.(1) Thus, any circumstances subsequent to that time have no value. Although this approach seems to be questionable,(1a) it is quite wise to defend it since the parties determine their mutual interest at that time;(2) if, moreover, the question were left open, there would be the risk that a party might take some unilateral action to render more serious the breach on the part of the other party.(3)

However, this is not the approach of the Convention in which no reference as regards the time of foreseeability could be found,(4) and this was the clear intention of the draftsmen.(5) So that any information provided after the conclusion of the contract could modify the situation relating to foreseeability test.(6) In brief, whether the criteria for this test are met is a question to be decided in the light of all surrounding circumstances from the time of concluding the contract until the time at which the breach, or even avoidance, took place.

33- 1) Art.10, supra, para. 17, the same is true under CITC(s.236).
1a) See also Document V/Prep./9 (Finland), in Hague Converence, vol. 2, p 271.
2) A/CONF.97/19, p 302, para.1 (Feltham of UK).
3) Ibid, p 297, para. 20 (Staleve of Hungary).
4) See Art. 25, supra, para. 17.
5) Feltham, 1981 J.B.L., p 346, 353, see also Perrott, 1981 Int. L. and F. Rev. p 582 who,however, considers this approach as "unfortunate" (ibid,pp 581-582). For different views, see generally the debate of the Conference (First Committee) on Art. 23 of the draft convention,A/CONF.97/19, pp 295 ff.
6) A/CONF. 97/19, p 302, para.2 (Rognliem of Norway).

Section II

Additional Time Notice

34. Texts

Art. 62.2 of ULIS provides that:

"Where the failure to pay the price at the date fixed does not amount to a fundamental breach of the contract, the seller may grant to the buyer an additional period of time of reasonable length. If the buyer has not paid the price at the expiration of the additional period, the seller may either require the payment of the price by the buyer or, provided that he does so promptly, declare the contract avoided."

While Art. 63 of the Convention provides that:

"1- The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

2- Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in performance."(1)

34- 1) For a legislative background of the text, see the following documents successively:-A/CN.9/87,annex 5 (art.72);A/CN.9/87, para.52, and annex 1 (art.72);A/CN.9/100, annex 1, art.44, (72); A/CN.9/116, annex 1 (art. 44);A/32/17, annex 1, para.373, and para.35 (art.45) of the original document; A/33/17, para.28 (art.59); at the Conference no amendments =

And Art. 64.1 of the Convention provides, inter alia, that: "The seller may declare the contract avoided if the buyer does not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 63, perform his obligation to pay the price ..., or if he declares that he will not do so within the period so fixed."(2)

1. Notion of notice

35. Generally

The additional time notice as provided for in both ULIS and the Convention is linked with the remedy of avoidance. Indeed, the aggrieved seller need not give it whenever he requires performance or claims damages.(1) It simply presumes that the seller seeks avoidance as a result of the buyer's actual breach, but either the breach is not fundamenal and does not therefore justify the avoidance or it is so but the seller wants to be certain of his step.(2) In either case, however, the seller is entitled to grant to the buyer an additional time notice for performing his obligation and if it expires without complying with it, the avoidance would then be justified(3) regardless of the degree of breach.(2)

34- =) were submitted and the text as such was adopted, see A/CONF.97/19, pp 124 (art.59) and 212 para. 47.

2) For a legislative background of the text, see supra, para. 17, note 1 .

35- 1) Post, para. 37.

2) Cf., however, the provision of ULIS, post, para. 42.

On the other hand, it is familiar when considering this notice to think about what so called in German Law"Nachfrist".(4) This is a notice calling on the non-performing party to perform within an additional period of time and stating that the creditor will after the expiration of the period refuse to accept performance.(4a) Nevertheless, it must be noted that the notion of a notice for performance is well-known in various domestic laws including English and French Law.(5) It is not exactly the "Nachfrist"(6) in German Law nor the "mise en demeure"(7) in French Law though it has certain parentage in either.(8) Nor is it the additional time notice given in English Law for making time of the essence of the contract.(9) The differences between these notices will be shown in the succeeding paragraphs.

35- 3) Post, para. 46.

4) See A/CN.9/100, annex 3, paras.66, 164; Goldenhielem, 10 Scan. Stud. in Law 1966, p 10, 15; Honnold, Uniform Law, para.290; Lagergren, 1958 J.B.L., p 138; OLRC Report, vol. 2, pp 392 f, and note 18.

4a) Treitel, Remedies, s.11, see also Williston on Contracts, para. 1337A.

5) As well as Italian and Greek Law, see Lagergren, ibid.

6) On the "Nachfrist" in general, see Treitel, Remedies,s.149; the main aspects of this expression in German Law will be shown below.

7) On the meaning of this term, see supra, para.12.

8) See A/CONF.97/5, comment on art.59, para. 8.

9) Post, para.39; see, however, Lagergren, ibid, who considered that the notice in draft ULIS 1956 was a compromise between French and Common Law.

36. Advantages

The additional time notice is to the benefit of both parties: the buyer and seller. As to the former, it gives him the opportunity to cure his breach by tendering performance during the extra time so given to him. In such a case, the seller is bound to accept the tender even where the buyer's breach is considered to be fundamental, or else he would become the party in default.(1)

As to the latter, the notice is of particular significance. This is due to the fact that the innocent seller, on whom the estimation of the degree of breach falls in principle, may misjudge the real situation;and in the belief that it is fundamental he may declare the contract avoided while the court is likely to reach another view.(2) The result of such assumption is clear, that is, the unjustified declaration of avoidance is in itself a breach of contract which militates against the seller.(3) In other words, the seller, instead of being the aggrieved party, would become in these circumstances the defaulting party. In an English case,(4) for example, the defendants were appointed as a concessionaire for marketing the plaintiff's products in Britain. In the belief that the former's non-payment in time constituted a repudiation of the contract, or say a fundamental breach, the plaintiff sent him a notice of avoidance. It was held that the breach was not so; rather, the plaintiff's act,

---

36- 1) Post, para. 45.
2) See, for example, the case cited in note 4 below.
3) See Magnous, 3 Com. L. Yearbook 1979, p 105, 115.
4) Decro-Wall International S.A. v.Practitioners in Marketing Ltd. [1971] 2 All E.R. 216.

which was accompanied by appointing another concessionaire, constituted a repudiation.

But in giving an additional time notice for performance, it is sufficient for the seller to wait until its expiration without payment by the buyer whereupon the avoidance would be justified,(5) and the degree of breach becomes irrelevant.(6)

This too would facilitate the task of the court. Certainly, it is much easier for it to ascertain the legality of avoidance if based on the additional time notice, than upon the principle of fundamental breach which is, as has been seen, a very complicated term under both ULIS and the Convention.(7)

37. Whose responsibility??

Giving the additional time notice under both ULIS and the Convention is the act of the innocent seller and not that of the court, which is the same in English Law with relation to the notice required for making time of the essence.(1) A similar principle is likewise applied in respect of the German "Nachfrist".(2)

In French Law, too, putting the non-performing party in default, i.e.,"mise en demeure",(3) when this is necessary,(4) must

---

36- 5) Post, para. 46.
6) This is at least the clear position of the Convention(post, para.42).
7) See supra, this Ch., s.I.

37- 1) Para.39 below. A similar rule seems to be applied under CITC (s.351).
2) Treitel, Remedies, s.151.

be done by the other party whether the avoidance is based on a contractual power or not.(5) In the latter situation, however, the court is empowered to give the debtor such a period of time for performance which is called here "a délai de grace".(6) Therefore, giving an extra time for performance in French Law is the act of the creditor or the court depending on the case. But it should be remembered that the idea of giving a "delai de grace" by the court is expressly rejected by both ULIS and the Convention.(7)

38. Mandatory or permissive??

The general principle underlying German Law is that the aggrieved party cannot resort to any remedy available to him, or, more precisely, to avoidance, performance or damages unless he gives the other party a "Nachfrist".(1) Exceptionally, however, a party is released from giving such a notice where, in particular, the defaulting party has expressly declared that he will not perform his obligations.(2)

37- 3) Supra, para. 12.
4) See para. 38, below
5) Supra, para. 21.
6) Supra, para. 20.
7) Post, para. 135.

38- 1) Treitel, Remedies, ss.11, 149.
2) Ibid, s.150; Williston on Contracts, 3rd ed. s.1337A; Zweigert, 1964 ICLQ, Supp. Pub. no. 9, p 1, 10.

Likewise, the "mise en demeure" in French Law is necessary before resorting to any of these remedies;(3) and the fact that the avoidance is derived from a contractual power does not, nevertheless, release the innocent party from his duty to put the other in default unless the agreement itself provides otherwise.(4) But it must be noted that the serving of a writ or summons produces the same effects of "mise en demeure".(5) In such a case, therefore, the "mise en demeure" is unnecessary.

By contrast, there is nothing in either ULIS or the Convention indicating that the unpaid seller is bound to grant the buyer an additional time notice for performance before resorting to any of his remedies. And this is thoroughly true in respect of performance, damages and avoidance when it is based on the fundamental breach. But when the breach is not fundamental and there is no agreement entitling avoidance,(4) the only ground for avoiding the contract is the additional time notice, which means that this notice is mandatory in these circumstances. On the other hand, neither ULIS nor the Convention contains a rule similar to that followed under both French and German Law, to the effect that the seller is freed from giving such notice if the buyer has expressly declared his intention not to perform; nor is it possible to conclude that the general principles on which either is based require this notice.(6)

38- 3) Supra, para.12.
4) Supra, para.21.
5) Starck, para. 2175, note 102.
6) By virtue of Arts.17 of ULIS and 7.2 of the Convention.

In English Law, finally, giving an extra time notice for performance is necessary before declaring the contract avoided only in the case in which time of payment is not of the essence of the contract.(7) Before considering this question below,(7) two points must be emphasized. Firstly, the giving of such notice is confined to the remedy of avoidance; therefore, the aggrieved party need not grant it whenever he seeks either performance or damages, which is the same, as has just been seen, under both ULIS and the Convention while another approach is followed in German as well as French Law. Secondly, it has been held(8) that if it is clear from the circumstances that the party in default (a seller of a freehold property) would not answer the other party's notice, it is quite unnecessary to give any notice for making time of the essence. As clear, this approach is similar, to some extent, to that followed in both German and French Law while the position of ULIS and the Convention is, as already mentioned, quite different.

39. English Law: time & essence

Under the English general law of contract, a sharp distinction has been made between two situations, that is, whether or not time of payment is of the essence of the contract.(1) If

---

38- 7) para. 39, below.
8) Re-Stone and Saville's Contracts [1963] 1 W.L.R.163, 171.

39- 1) See the authorities cited in the following notes. It has been considered in this respect that the above distinction seems to be an application to the dichotomy (supra, para.21) of "conditions" and "warranties"; see Bateson, 1957 J.B.L., p 357.

so, the innocent party is entitled to avoid the contract immediately upon the other's delay, however short, in making payment. If not, avoidance may not be available unless two requirements are satisfied.(2) Firstly, the delay in payment is improper, undue, unnecessary or the like.(3) Secondly, the aggrieved party has given the other a reasonable notice for performance which has been expired without complying with it.(4)

However, it seems to be settled that time of payment is of the essence only in three cases:(5) if the contract so provides, where the circumstances including the nature of the subject-matter indicate that and where the defaulting party is given a reasonable time notice for performance. This principle is of general nature(6) and therefore applies to

---

39- 2) Or unless the delay, as has been said, is so great as substantially to destroy the consideration which was promised; see Lingren, Time and Performance of the Contract, 1976 p 42.

3) See Ajit v. sammy [1967] 1 A.C.255 where Stickney v. Keeble [1915] A.C. 386 was applied; Re-Bayley & Shoesmith's Contract (1918) 87 L.J.R. Ch.626, 628; Smith v. Hamilton [1951] Ch.174, 181; Thorpe v. Fasey [1949] Ch.649, 655.

4) Ajit case, ibid; Hartley v. Hymans [1920] 3 K.B.475; Luck v. White (1973) 26 P & C.R 89; Charles Rickards Ltd. v. Oppenhaim [1950] 1 K.B.616, 624; Re-Bayley case, ibid; Stickney case, ibid.

5) See Chechire, Fifoot & Furmston, p 499; Halsbury's Laws of England, vol. 9, para. 481; see also note 7, below.

6) The general rule under CITC too (s.236) is that "... in cases of doubt, a breach of contract shall not be considered essential"; but, cf., s.350, below, note 9.

all contracts.(7)

On the other hand, the non-defaulting party may waive his right as to time of payment; in that case, he cannot rely on the previous delay for resorting to avoidance which means that such time no more remains of the essence. In such a case, however, time becomes again of the essence upon giving a reasonable notice for performance.(8)

So far as the sale of goods is concerned, s.10.1 of the SGA provides that time of payment is not of the essence of the contract.(9) If, therefore, the principle laid down under the general law of contract is to be applied, which is assumed, the unpaid seller may make time of the essence by giving the buyer an additional time notice of reasonable length for payment; and if it expires without complying with it, the declaration of avoidance would be legally justified. But a different rule seems to be followed where, in international sales in particular, payment is to be made by a letter of credit. In that case,

---

39- 7) See United Scientific Holdings Ltd. v. Burnley Borough Council [1978] A.C. 904, 958; see also Beale, Remedies for Breach of Contract, 1980, p 90.

8) See Charles Rickards case, ibid; Hartley case, ibid; Luck case, ibid.

9) See also United Dominions Trust (commercial) Ltd. v. Eagle Aircraft Services Ltd. [1968] 1 W.L.R. 74; Decro-Wall International S.A.v.Practitioners in Marketing Ltd. [1971] 2 All E.R. 216, particularly at p 222. But cf., s.350 of CITC which reads: "In case of doubt, failure to pay the purchase price in time shall be considered as an essential breach of contract."

time of opening the credit, as has been observed,[10] is of the essence and if the buyer does not open it on the date so fixed, the seller is entitled to avoid the contract without being bound to grant him any extra time for performance. If, however, the contract does not determine the date of opening the credit but simply specifies a period for shipment, which is very familiar in international trade, the buyer must open it prior to the earliest date for shipment.[11]

In all cases, the seller is entitled, by virtue of s.48.3 of the SGA, to resell the goods if he has given the buyer a notice of his intention and the latter does not within a reasonable time pay or tender the price. In such a case, the contract is deemed to be avoided by the resale.[12] Once again, it is suggested that a seller who seeks avoidance is not bound to resell the goods;[13] rather, he can avoid the contract by turning on the general rule dealing with the additional time notice, and keep the goods for his own use.

39- 10) Benjamin, para. 2166.

11) Ian Stach Ltd. v. Baker Bosley [1958] 2 Q.B.130; Pavia & Co., S.P.A. v. Thurmann-Nielsen [1952] 2 Q.B.84. But when payment is to be made cash against documents, the buyer must pay the price within a reasonable time of presentation of documents, see **Ryan v. Ridley** (1902) 8 Com. Cas. 105, 107.

12) See R.V. Ward v. Bignall [1967] 1 Q.B. 534.

13) See Benjamin, paras. 1235, 1249.

40. Content of notice

It seems that neither English nor French Law requires any specific statement to be mentioned in respect of the additional time notice for making time of the essence, or of the "mise en demeure" respectively.(1) Thus, it is sufficient that the unpaid seller calls upon the buyer to make payment within a reasonable time or the like. In particular, he need not mention the consequences which are likely to occur in case of buyer's failure to comply with the notice such as avoidance or otherwise. The reason for that is, perhaps, that the seller is not obliged to avoid the contract when the requirements of avoidance are met; instead, he may insist on claiming performance and treat the grounds for avoidance as never having existed. In other words, he has the right of option either to avoid the contract or to affirm it.(2)

One may well say that this is also the approach of ULIS as well as the Convention where both obviously consider the avoidance on the ground of the additional time notice as the seller's right, and not a duty imposed upon him.(3) That is to say, that the unpaid seller has, in these circumstances, the right of election between avoidance and performance;(4)

40- 1) The same may be true under CITC (ss. 237, 351).
2) For further details of the doctrine of option, see post, paras. 49, 52.
3) See art.62.2 of ULIS and Art.64.1 of the Convention (supra, para.34).
4) See further post, paras. 46, 52.

and this would suggest, again, that no particular statement must be inserted in the relevant notice.(5)

The solution followed in German Law is quite different. As was indicated, one of the main features of the "Nachfrist" is that the creditor must state that he will not after the expiration of the extra period accept performance;(6) and in doing so, he would be deprived of the right to claim performance at the end of the designated period.(7)

2. Requirements of notice

41. Delay in performance

It is clear from the relevant provisions of ULIS and the Convention that the unpaid seller is not entitled to give the notice unless and until there is an actual breach committed by the buyer;(1) otherwise it is assumed that the notice has no

---

40- 5) Cf., Honnold, Uniform Law, paras. 289, 351 who says that the notice may serve as basis for avoidance only if it states that the other party has an additional and final period for performance.

6) Supra, para. 35.

7) Treitel, Remedies, s.149.

41- 1) See Art.62.2 of ULIS (supra, para.34):"Where the failure to pay the price at the date fixed...", and particularly the first sentence of Art.61.1 of the Convention:"If the buyer fails to perform...". See also CITC, s.237.1:"If the delay...", and s.351:" If the buyer commits a breach of contract by failing to pay the purchase price... in accordance with the contracted conditions....".

legal effect and, therefore, the seller cannot rely on it for avoiding the contract. But unlike English Law,(2) he may give the notice immediately after the buyer's breach without being bound to wait the lapse of any period of time.

On the other hand, it seems that it is not possible to talk about an "additional period" under both ULIS and the Convention without assuming in advance that the original period for performance has already expired. In other words, the seller cannot turn on the notice unless there is an actual delay in paying the price(3) even if the buyer has already violated the contract in respect of payment. To illustrate, suppose that a contract provides that payment must be made during three months, say May, June and July by a confirmed letter of credit. Suppose too that on June 1, the buyer has opened an unconfirmed credit where the seller has immediately given him a notice of reasonable length which expires on June 20. In this setting, the notice may not constitute a good ground for avoidance. The result of this assumption is that the buyer can cure any defect in his performance so long as time of payment has not expired yet.

In English Law, moreover, the mere delay does not justify giving the notice; rather, it must be, as has been seen,

---

41- 2) Supra, para. 39.

3) See also CITC, ss.237 (where there must be a "delay"), 350 & 351: "additional term". It is to be noted that s.237 provides for the general rule while the other two deal with payment of the price.

improper.(4) As to the buyer's right to cure his failure in these circumstances, the general rule seems to amount to this: a valid tender subsequent to a bad one must generally be accepted(5) even where, presumably, the time of payment has elapsed provided that such time is not of the essence.(4) And this is so unless, of course, the debtor's first tender amounts to a repudiation of the contract which has been accepted by treating the contract by the aggrieved party as avoided(6)

42. Degree of breach

It is quite plain from the Convention that the seller may rely on the additional time notice for avoiding the contract irrespective of whether or not the buyer's breach is fundamental.(1) A valid notice, however, makes the degree of breach irrelevant.(2)

The apparent meaning of the relevant provision under ULIS gives another understanding, that is, the notice does not justify avoidance unless the breach is non-fundamental.(3) But a

---

41- 4) Supra, para. 39.
5) Treitel, Remedies, s.174, and in Law of Contract, pp 565 f; see also Tetley v. Shand (1871)25 L.T.658 (a seller was in default).
6) Treitel, Law of Contract, p 566.

42- 1) Art.63.1, supra, para. 34.
2) Only in respect of the avoidance, for there are other situations in the Convention which depend on the fundamental breach (e.g, Arts.46.2 and 70).
3) The same may be true under CITC (ss.237.1 and 351).

construction as such is indeed difficult to be justified. In addition to the practical advantages ensuing from the notice even where the breach is fundamental,(4) it seems to be unsound that a seller who has made an attempt to maintain the contract alive is to be penalized. It may be argued in this respect that the fundamentality of breach, instead of the notice, constitutes a good ground for avoidance;(5) although this is quite true, it is to be noted that two main problems are highly likely to arise in these circumstances.

Firstly, the difficulty of proving the degree of breach where at least part of the onus will rest with the seller.(6) Secondly, giving the notice by the seller, while he has the right to avoid the contract on the ground of the fundamental breach, might be construed as an affirmation of the contract;(7) and in such an event another main difficulty arises, that is, whether he can retract his decision.(8)

43. Reasonable period

The Convention expressly provides that the additional

42- 4) Supra, para. 36.
5) Supra, this Ch., S.I.
6) See para. 31, supra.
7) Where the affirmation may be express or implicit (Chitty, para. 1593); and it may be made by words or acts or even by silence (Cheshire, Fifoot & Furmston, p 489).
8) See, by way of contrast, para. 46, post.

period must be reasonable(1) which is the same under both ULIS and English Law.(2) Whether it is so, is a question of fact to be determined in each particular case in the light of its own circumstances.(3)

Further, the period as stated in the Convention must be "fixed" either by specifying the date on which payment should be made, say on May 1, or by specifying a time period(4) say two weeks, one month or the like. But the relevant provision under ULIS which requires that the additional period must be of "reasonable length"(5) is indeed capable of dual interpretation.

It may be said, on the one hand, that it is not possible to decide whether the length of the period so given is reasonable without "fixing" it in advance. On the other hand, it is

---

43- 1) Art.63, supra, para.34; cf., s.351 of CITC which provides for an "additional term for payment" of the price, but see s.237 dealing with the general rule where a "reasonable term" is required.

2) Art.62 of ULIS (supra, para. 34); as to English Law, see para. 39, supra.

3) Ajit v. Sammy [1967] 1 A.C.255 where Stickney v. Keeble [1915] A.C. 386, 415 was applied; Charles Rickards Ltd. v. Oppenhaim [1950] 1 K.B. 616, 624; United Dominion Trust (Commercial) Ltd. v. Eagle Aircraft Services Ltd. [1968] 1 W.L.R. 74, 82, 87; a similar principle applies when a reasonable notice is provided for in the contract, see Decro-Wall International S.A. v. Practitioners in Marketing Ltd. [1971] 2 All E.R.216, 229.

4) A/CONF.97/5, comment on art. 59, para. 7.

5) Art.62.2, supra, para. 34.

quite possible to assume that, while the reasonableness is a question of circumstances in each case, it is therefore sufficient to grant the buyer such period of time without fixing it by saying, for instance, "within a reasonable time".

The difference between these two interpretations seems to be significant in practice. Under the Convention, for example, it has been suggested that the seller cannot rely on the notice for avoiding the contract if the period is not "fixed".(6) If, however, this understanding is correct, then it shows another difference between the Convention and the German "Nachfrist" under which the creditor need not specify any time at all but simply ask for performance within a reasonable time.(7)

3. Effects of notice

44. Criticism of Convention

In giving the buyer an additional time notice for performance, the seller cannot during that period resort to any remedy for breach of contract. This generalization in the Convention is misleading and in fact inaccurate. For example, it is granted

---

43- 6) A/32/17, annex 1, para. 236 concerning the buyer's remedies but the same principle applies to the seller's remedies, cf.; the formula submitted by the S.G. to the W.G., A/CN.9/87, annex 4, para. 36 (art.72); and the draft text as adopted by the W.G., in A/CN.9/116, annex 1 (art.44).

7) Treitel, Remedies, s.149.

that the seller may exercise his right of withholding delivery if its requirements are met(1) even though the period has not yet expired.(2) The true tenor of the Convention appears to refer to those remedies as indexed under the title of "Remedies for breach of contract by the buyer" which are (claiming) performance, avoidance and damages.(3) But this remedial index is not comprehensive where the remedy of withholding delivery is expressly recognized by the Convention(1) though it is not inserted under that index.

45. Suspension of avoidance

So the seller cannot resort, under the Convention, to avoidance as long as the additional time is still running even where the buyer's breach was fundamental. The reason for this rule is, as said, to protect the buyer who might be preparing to perform the contract as requested by the former.(1) Although

---

44- 1) See Art.58.1 of the Convention (supra, para. 10).
2) See, by way of contrast, Woods v. Mackenzie Hill Ltd. [1975] 1 W.L.R. 613, 615-16, approved in Rainerie v. Miles [1981] A.C. 1050, 1086-87. In the former case, it was held that the notice, which was made according to an agreement, would not affect, as a rule, the remedies available to the innocent party.
3) Part. II, Chapter III, Section III.

45- 1) A/CONF.97/5, comment on art.59, para.9; A/CN.9/116, annex 2, comment on art.44, para.4. Cf., s.350 of CITC which provides that the seller may avoid the contract even before the expiration of the period if he is likely to incur excessive costs or considerable damages due to the buyer's default; and for the reason of this rule, see Kopac, comment on s.350, pp 119-120.

ULIS does not contain an express provision to this effect, common sense may lead to a similar rule. Since performance and avoidance are inconsistent, the seller cannot resort to the latter while requiring the former;(2) and this is moreover in conformity with the principle of good faith which prevails in international trade law in particular.

Accordingly, one may well say that the seller is bound to accept the buyer's performance if duly tendered during the currency of the notice, or else he would be a defaulting party. A similar principle is likewise adopted by English Law.(3)

46. Expiration of notice

The seller's remedy of avoidance revives if the additional time expires without performance (or proper tender) by the buyer. Though ULIS and the Convention are in agreement on this matter;(1) there is an important point of divergence between them.

Under the latter, the seller's right of avoidance continues to exist so long as he is not yet paid;(2) his mere silence,

---

45- 2) The converse is also true, that is, he cannot demand performance if he has already avoided the contract (A/CN.9/87, annex 4, para.36, art.72 as proposed by the S.G.).

3) Finkielkraut v. Monohan [1949] 2 All E.R. 234, 237.

46- 1) Arts.62.2 of ULIS and 63 of the Convention (supra, para.34); as to English Law, see supra, para. 39.

2) Art.64.2 of the Convention under which the seller may lose the right of avoidance only if the buyer has paid the price; see also Honnold, Uniform Law, para.358; A/CN.9/116,annex 2,=

therefore, may never be construed as an affirmation of the contract depriving him of avoidance.(3) In fact, this is not exactly the position of ULIS where Art. 62.2 provides that a seller who relies on the additional time notice for avoidance must express his intention "promptly" after the expiration of the notice. Insofar as avoidance is concerned this term,which was deleted from the Convention,(4) means by virtue of Art. 11 of ULIS that avoidance must be declared "within as short a period as possible, in the circumstances from the moment" the avoidance "could reasonably be" declared. In practice, however, elastic words of this type will empower the court to play a main role when deciding whether the avoidance has taken place "promptly". In other words, this question is of circumstances to be decided by the court on a case by case basis.

The real, and may-be the only, understanding of ULIS' approach is that no more can the seller resort to avoidance if he has not declared it promptly. In these circumstances, however, he remains having the right of claiming payment of the price, interest and damages if any. But this approach, however defendable, may in certain events lead to unreasonable results and is therefore difficult to be justified.

To illustrate, suppose that the seller has not declared

46- =) comment on art.45, para.7; A/CONF.97/5, comment on art.60, para.8. A similar rule applies under CITC (s.352).

3) See further para. 57, post.

4) See further A/CN.9/100, para. 46.

avoidance promptly; suppose too that the buyer insists on non-performance; suppose, finally, that the judicial competent is held to a court which shall not, according to ULIS itself,(5) enter a judgment of specific performance, or say payment of the price, because it would not do so under its own law in respect of similar contracts not governed by ULIS. In this setting, it is clear that the seller cannot resort to avoidance, nor can he claim payment. The situation becomes more complicated when recalling that the calculation of damages under ULIS is based on whether the contract has been avoided or not;(6) and it is indeed difficult to envisage the latter situation without assuming that the seller has the right to require performance, i.e., payment of the price. The key question which may arise here is, therefore, how to assess damages where neither avoidance nor requiring payment is available to the seller.

For solving this intricate problem, it is quite reasonable to suggest that the right of avoidance revives if, again, the seller has served the buyer another additional time notice, but the latter has not complied with it. And this seems to be the real situation in practice where it has been held by a (W.) German Court(7) applying Art. 75 of ULIS, which will be examined

---

46- 5) See in detail post, paras. 137, 139.
6) See the remedy of damages, post, Ch.II.
7) Bundesgerichtshof, 28 III. 1979-VIII ZR. 37/78, in UNIDROIT. 1979, vol. 2, p 276.

later,(8) that the fact that avoidance must be declared promptly does not prevent the innocent party from only exercising his right of avoidance after he has given the other party a further period of time for performance.

The rule adopted under the English general law of contract is that the silence of the aggrieved party, who has the right to avoid the contract, may be construed, as will be seen later,(9) as an affirmation of the contract; and this is in particular so where the delay in exercising avoidance is unreasonable. Accordingly, it may be that the seller's right of avoidance, on the assumption that it turns on an additional time notice,(10) must be exercised without "unreasonable delay"(9) otherwise he is deemed to have lost this remedy. A rule as such is obviously comparable to that adopted by ULIS; and it is really difficult in practice to assume that there is any difference between the expressions "promptly" under ULIS and "without unreasonable delay" under English Law where the application of either solely depends on the circumstances of each particular case.

On the other hand, it is submitted that the right of avoidance may revive in English Law if, by analogy with the doctrine of waiver,(11) the defaulting party has not complied

---

46- 8) Post, para. 75.
9) Post, para. 57.
10) Supra, para. 39.
11) Supra, para. 39; see also Chitty, para. 1495 where it is considered that affirmation of contract may be regarded as a species of waiver.

with another extra time notice given to him for performance. Here again, this suggested rule is presumably in line with ULIS.

47. Buyer's notice of non-payment

The seller's remedy of avoidance under the Convention revives too if, before the expiration of the extra period, he has received a notice from the buyer to the effect that he will not perform his obligations.(1) This provision has no counterpart in either English Law or ULIS; and it is doubtful to assume that it could be inferred from the general principles on which the latter law is based.(2)

The buyer's notice must clearly declare his intention that he will not perform his obligations. So, for instance, if he suggests the amendment of the contract or requests the seller to extend the additional period, the latter cannot rely on such notice for avoiding the contract.

On the other hand, the buyer's notice has no legal effect unless the seller receives it. Obviously, this is an exception to the general rule under the Convention whereby any communication between the parties would have effect upon its despatch to the addressee if given by means appropriate in the circumstances.(3) It should be noted that, while setting the

---

47- 1) Art.64.1 of the Convention (supra, para.34).
2) See Art.17 of ULIS.
3) Post, para. 59.

relevant text, there was a clear tendency that its purpose is to place the risk of any loss, delay or error in transmission of the buyer's declaration of non-compliance with the seller's notice of performance on the buyer(4). But this point of view is questionable on the ground that the buyer's notice always operates to his detriment and at the same time to the benefit of the seller. This is due to the fact that such a notice revives the latter's remedy of avoidance. If, for example, the notice has lost before receiving it, the seller cannot turn on it for avoiding the contract even assuming that he has obtained actual knowledge of its content. Furthermore, it may be that the buyer can withdraw his declaration of non-performance so long as the seller has not yet received it. This simply means that the receipt theory here operates against the draftsmen's intention.

47- 4) A/32/17, annex 1, paras. 378 f.

Section III

Mechanism of Avoidance

1. Ipso facto avoidance in ULIS

47A. Texts

Art. 61.2 of ULIS provides that:

"The seller shall not be entitled to require payment of the price by the buyer if it is in conformity with usage and reasonably possible for the seller to resell the goods. In that case the contract shall be ipso facto avoided as from the time when such resale should be effected."

And Art. 62.1 provides that:

"Where the failure to pay the price at the date fixed amounts to a fundamental breach of the contract, the seller may either require the buyer to pay the price or declare the contract avoided. He shall inform the buyer of his decision within a reasonable time; otherwise the contract shall be ipso facto avoided."

48. Cases of avoidance

The term "ipso facto" avoidance under ULIS(1) means that the contract comes to an end by operation of law, ie, automatically(2) irrespective of the parties' will or intention.(3)

48- 1) See generally the study of the S.G., in A/CN.9/WG.2/WP.9.
2) Ibid, para.20; A/8017, para.45; Burke, 22 H.I.L.J. 1981, p 374, note 30; Honnold, Uniform Law, para.187, and in 27 A.J.C.L. 1979, p 223, 228, and in 30 Law and Con. Prob. -

And this happens, as clear from the above texts, in either of two situations.

In the first place, the seller has, as a rule, the right to require payment of the price.(4) But he is not entitled to do so if it is in conformity with usage (5) and reasonably possible for him to resell the goods. In that case, the contract is ipso facto avoided as from the time when such resale should be effected, that is to say when it really takes place.(6) It seems that "usages" and "reasonably possible" refer in practice, as said, to such circumstances where the seller remains in possession of the goods, otherwise usages are fairly uncommon.(7) Similarly, where the resale is not possible, it is clear that usages could not require it and, therefore, this provision would not apply.(8) Nevertheless, it should be emphasized that the relevant provision, where its requirements are met, expressly imposes upon the seller a duty to resell the goods(9) even at a price lower than the

---

48- =) 1965, p 326, 344.

3) A/CN.9/WG.2/WP.9, para.8; Baer, p 104.

4) By virtue of Art.61.1 (post, para. 131).

5) Inserting "usage" in the text has been criticised on the ground that usages always prevail over the Law according to Art.9(A/CN.9/87, para.45).

6) Cf., A/CN.9/WG.2/WP.9, para.8 where it is said that the avoidance in that case is operative upon the breach.

7) Baer, p 105.

8) Document V/Prep/3, in Hague Conference, vol. 2, p 199.

9) Document V/Prep/1, in Hague Conference, vol. 1, p 37.

contract price.(10) In these circumstances, however, he may have the right to a claim for damages.(11)

In the second place, the buyer's breach may be fundamental in the meaning discussed above.(12) In such a case, the seller has the right of option either to avoid the contract or to require payment;(13) but he shall inform the buyer of his decision within a reasonable time, otherwise the contract shall be ipso facto avoided.(14) What constitutes a reasonable time(15) is a question of fact depending upon the circumstances of each particular case. The period starts to give effect, as suggested, as from the date at which the seller has obtained actual knowledge of the buyer's breach,(16) because it is not possible to give one party an option between two remedies and in addition to inform the other party of his decision without assuming such knowledge.

48- 10) Graveson and Cohn, p 87.

11) According to Arts.84-86 (post, paras. 113,118, 121).

12) Supra, this Ch., S.I.

13) See also Khan, 17 Rev. Trim. Dr. Com. 1964, p 689,722.

14) Another approach seems to be followed under both English Law (post, para.57) and CITC which, however, uses the words "without undue delay" (s.235.1). In both, the silence of the innocent party may, in certain circumstances, lead to an affirmation of the contract but not to avoidance.

15) As to the difficulties flowing from this expression, see A/CN.9/WG.2/WP.9, paras. 53 ff.

16) Which is the same under CITC (s.235.1):"...as soon as he has learned of such breach". As to English Law, see para. 49, below.

49. English Law

The doctrine of ipso facto avoidance as adopted by ULIS has no counterpart in English Law in which two main principles are well-established.

Firstly, the aggrieved party, assuming that he is entitled to resort to avoidance, has the right of election between this remedy and affirmation of the contract. This principle is of general nature in the sense that it applies to all contracts including the contract of sale, and in spite of whether the breach is actual or anticipatory.(1) On the other hand, affirmation may not be presumed to have taken place so long as the innocent party has not possessed actual knowledge of the other's breach.(2) And this seems to be so notwithstanding that it has been held in one case that in waiving his right as to avoidance, the non-defaulting party need not have knowledge of the breach.(3)

49- 1) See, eg, Denmark Productions Ltd. v. Boscobel Productions Ltd. [1969] 1 Q.B. 699,731; Heyman v. Darwins Ltd. [1942] A.C. 356,361; Howard v. Pickford Tool Co. Ltd. [1951] 1 K.B.417, 420-421; Johnstone v. Milling (1886) 16 Q.B.D. 460,467; Michael v. Hart and Co. [1902] 1 K.B.482,490; The Odenfeld [1978] 2 Lloyd's Rep.357,374-375. And for further details, see para. 52, post.

2) See, eg,Alexander v. Railway Executive [1951] 2 K.B. 882, 889-890; Farnsworth Finance Facilities Ltd. v. Attryde [1970] 1 W.L.R. 1053, 1059. See also Beale, p 118; Thomson, 42 M.L.R. 1978, p 137, 142.

3) Panchaud Freres S.A. v. Etablissments General Grain Co. [1970] 1 Lloyd's Rep.53,57. And for a criticism of this case, see Dugdale and Yale, 39 M.L.R. 1976, p 680, 688.

Secondly, the contract may not, as a rule, come to an end automatically.(4) Here again, another approach was followed in one case where the court considered that the contract might, in certain events, be terminated automatically.(5) Likewise, it has been argued that the breach always bring the contract to an end automatically unless the victim affirms it.(6) But it is really difficult to regard this automatic theory, as it may shortly be described(7) as law at present time.

However, it is relevant here to remember that the unpaid seller has been given, by s.48.3 of the SGA, a statutory power to resell the goods if they are of perishable nature, or if he has given a notice to the buyer of his intention to resell but the latter has not within a reasonable time paid or tendered the price. And if the resale has actually taken place, then the contract is deemed to be avoided, say automatically, as

---

49- 4) See Cheshire, Fifoot and Furmston, p 489.

5) Harbut's Plasticine Ltd. v. Wayne Tank & Pump Co. Ltd. [1970] 1 K.B.447, 465.

6) Thomson, ibid, p 137. Cf., Yates, Exclusion Clauses in Contracts (1982, pp 199, 223,225) who, in distinguishing between a fundamental breach and a breach of fundamental term, argues that the contract in the latter situation must, ipso facto, be regarded as terminated because there is total failure of consideration and, therefore, there is nothing to affirm.

7) See McMullen, 41 C.L.J. 1982, p 110, 111; see, further, Dawson, 40 C.L.J. 1981, p 83, 105.

from that time.[8] This situation, therefore, may be regarded as an application of the doctrine of ipso facto avoidance. A similar principle also applies to the situation in which the resale is based on a contractual power derived from s.48.4 of the SGA which provides that: " Where the seller expressly reserves the right of resale in case the buyer should make default, and on the buyer making default resells the goods, the original contract of sale is rescinded...". This means, in other words, that such resale (automatically) brings the contract to an end.

Unlike the first case of ipso facto avoidance under ULIS, however, English Law does not impose on the seller a duty to resell the goods;[9] rather, he may resort to avoidance and at the same time keep the goods for his own use.[10]

50. Criticism generally

The doctrine of ipso facto avoidance as adopted in ULIS has been liable to various criticisms[1]

49- 8) See R.V.Ward Ltd. v. Bignall [1967] 1 Q.B.534, overruling Gallagher v. Shilcock [1949] 2 K.B.765 in which s.48.3 of the SGA was construed to the effect that the resale did not terminate the contract. And for further details on the resale under the Act, see paras. 182 ff, post.

9) Graveson and Cohn, p 87.

10) Supra, para. 39.

50- 1) See generally A/CN.9/35, paras.94 ff, and annex 2, paras.70 ff; A/CN.9/WG.2/WP.9 paras.12 ff; Burman & Kaufman, 1978 H.L.J., p 221, 268; Goldenhielm, p 35; Honnold,30 Law & Con. Prob. 1965, p 326, 384, and in 27 A.J.C.L. 1979, p 223,228; Treitel, Remedies, s.154.

As to form, the expression "de plein droit", which is familiar to French Lawyers, has been used in the French text and this rendered into English as "ipso facto" which is an odd term for Common Lawyer.(2)

As to substance, this type of avoidance produces considerable uncertainty in international trade(3) where there may be situations neither party could know whether or not the contract has come to an end.(4) The question becomes more complicated when recalling that ULIS uses for the ipso facto avoidance elastic terms such as "reasonably possible" and "reasonable time", both in practice would be liable to different interpretations.

Furthermore, the doctrine may in certain circumstances lead to an odd result by redounding to the benefit of the defaulting buyer and to the detriment of the aggrieved seller.(5) This may happen where, for example, the prices fall sharply and damages do not, for any reason, give the seller full recovery for his loss resulting from the buyer's breach.(6)

50- 2) See Honnold, 27 A.J.C.L. 1979, note 24.
3) A/CN.9/35, para. 94, and annex 2, para. 73.
4) A/CN.9/WG.2/WP.9, paras. 53-54.
5) Ibid, para. 58.
6) But it has been said, where the seller is in default, that ipso facto avoidance might be fair in case of commodities of which the prices fluctuated rapidly, but not in the case where the prices tended to be more stable, see A/CN.9/31, para. 108.

In addition, where the seller has not yet declared his intention it would be more justifiable to presume his will to retain the contract and not to avoid it;(7) while the converse is provided for by ULIS in respect of the second case of ipso facto avoidance already discussed. It is noteworthy that when avoidance is based on an additional time notice, the seller must, by virtue of Art. 62.2 of ULIS;(8) declare it promptly otherwise the contract is deemed to have been affirmed.(9) Thus, the contradiction in ULIS' approach is obvious; in one case the seller's silence leads to avoiding the contract while in another it leads to an affirmation of it.

Finally, it is really difficult to justify ULIS' trend in imposing avoidance on both parties who may not wish this result in spite of the breach or the expiration of any period of time subsequent to its occurrence.

51. Criticism of first case

The first situation of ipso facto avoidance under ULIS in particular is not free from criticism.

In the first place, the wording of the text leads to the conclusion that the degree of breach is an irrelevant factor

---

50- 7) A/CN.9/WG.2/WP.9, para.14; and this seems to be the situation under both CITC (s.235) and English Law (post, para. 57).

8) Supra, para. 34.

9) Supra, para.46; post, para. 57.

with relation to the avoidance although this is obviously the most serious remedy especially in international trade.[1] The result of this situation is that the seller can easily bring the contract to an end immediately after the breach by reselling the goods even where such breach is deemed to be so trivial. So, for instance, the buyer may delay in making payment for one day only; even conceding that a breach as such has no importance whatsoever, the seller may, nevertheless, resell the goods in the next day and, accordingly, the contract becomes avoided.

In the second place, the provision as such may put the seller in a critical position; for he cannot demand performance, nor can he keep the goods for his own use, nor is he entitled to declare the contract avoided. By way of summary, he is bound to resell the goods though there is no rational justification to impose the resale upon him.

52. Contrast with seller's option

The doctrine of option, insofar as the unpaid seller is concerned, may be crystalized into two rules:-

Firstly, the seller is not bound to avoid the contract nor to require performance; rather, he has the right of option

---

51- 1) This attitude may, however, be justified when avoidance is based on an additional time notice (supra, para.42) on the ground that the buyer insists on non-performance notwithstanding that he has been given another opportunity to make performance.

to resort to either of them.[1] Secondly, in each case he is entitled to avoid the contract, he automatically has such right of option. Instead of avoiding the contract, therefore, the seller may affirm it and insist on requiring performance.But the converse is not necessarily true where he may have the right to demand performance but not to avoid the contract. And this is precisely so where neither the breach is fundamental nor the buyer has been given an additional time notice for performance.[2] This principle is well-established in English Law,[1] but as such is not known under French Law in which a distinction should be drawn between whether the avoidance is based on a contractual power or not. If so, the parties' agreement is, as has been seen,[3] respected and the court has no discretion in the matter. But the innocent party is of course not bound to resort to avoidance; rather, he may insist on performance. In other words, he has a right of option similar to that applied under English Law. If not, then he has the option to request the court to enforce performance or to grant him a decree of avoidance, but the court has, in respect of the latter remedy, a large discretion to award avoidance or otherwise.[4]

52- 1) See the authorities cited in the notes of para.49, supra particularly in note 1.

2) On both the fundamental breach and additional time notice, see this Ch., ss.I and II respectively.

3) Supra, para. 21.

4) Supra, para. 20.

By contrast, one may well say that the seller does not have, with relation to the first situation of ipso facto avoidance under ULIS, such right of choice; rather he is bound to resell the goods and, accordingly, the contract becomes ipso facto avoided as from the time when such resale should be effected. But a different approach is being followed by ULIS in respect of the second situation where the seller has in fact the option to resort either to performance or to avoidance; such right, however, must be exercised within a reasonable time, otherwise the avoidance would take place automatically.

53. Advantages are arguable

Notwithstanding the plain disadvantages of ipso facto avoidance, the doctrine has been defended on various grounds as follows:[1]

On the one hand, the doctrine in certain sales is consistent with commercial practice. On the other hand, a notice to be required for avoidance would deprive the innocent party of his right if he has not complied with a formality which would be completely unnecessary in certain circumstances. Further, a party who has to give such a notice would be obliged to retain proof of it. Thus, a simple clarification of the situation by telephone would be rendered impossible.

Regardless of the first ground of defending the doctrine, the other two seem to be arguable .

53- 1) A/CN.9/35, para. 96; see also A/CN.9/62, annex 2, para.30.

Firstly, the law of contract in general is composed, as well-known, of rights and obligations; and it is granted that any party who seeks the exercising of any of his rights must comply with certain requirements. So it is not unusual to require for avoiding the contract that the innocent party should expressly declare his intention of avoidance.

Secondly, as to the problem of proof, it generally relates to all communications provided for in both ULIS and the Convention, and is not confined to the declaration of avoidance. However, this question is completely another matter and was left, as a rule, outside the scope of both laws.(2) In spite of that, it is submitted that such communications in general have been freed from any requirement as to form.(3) Accordingly, this problem could easily be solved by telex, for example, which is widespread in modern international trade, on the one hand, and, on the other, is admitted as a writing means of communication.(4)

53- 2) Cf., post, para.152; cf., also para.31, supra.

3) See, for example, Arts.15 of ULIS and 11 of the Convention (conclusion of the contract); Arts.14 of ULIS and 27 of the Convention (post, paras. 58,60); s.24.1 of CITC; Honnold, Uniform Law, para.130. Nevertheless, it may be that a telephone call, as has been held in W. Germany, does not constitute a valid notice if a party is not able to understand sufficiently the language of the other party who is bound to make the notice (quoted in Magnus, Com. Law YB., 1979, p 105, 115).

4) See Art. 13 of the Convention; s.24.3 of CITC; s.2.1 of COMECON General Conditions of Sale of 1968.

54. Its elimination from Convention

Whatever the advantages of ipso facto avoidance, its disadvantages are obviously much more and, as said, the only benefit of the concept is that it could prevent the non-defaulting party from profiting from the price fluctuations, but even this advantage could be dealt with directly without resorting to the concept itself.(1) So almost all discussions relating to ipso facto avoidance under ULIS were to the effect that the whole concept should be excluded from the new convention,(2) or at least the cases to which it applies should be surrounded with more restrictions.(3) But the former view prevailed(4) and the Convention in its current form requires in each case of avoidance that a declaration of avoidance by the injured party to be notified to the other party is necessary, or else the contract continues to exist.(5)

54- 1) A/CN.9/62, annex 2, para. 29.

2) But there was an opinion to the effect that the concept of ipso facto avoidance should be maintained (ibid, paras.29-30).

3) See, eg, the opinion of Norway, in A/CN.9/31, para.127; see also A/CN.9/35, para.98.

4) But there was an opinion which expressed the regret that the concept had been disappeared and the substitute texts were unattractive and complicated, see A/CN.9/87, annex 2 (Austria, para. 3).

5) For a legislative background of this approach, see the following documents successively:-A/CN.9/35, paras.92 ff, and annex 2, paras. 70 ff; A/CN.9/WG.2/WP.9; A/CN.9/62, annex 2, paras. 28 ff.

and this has been described as one of the improvements of the Convention over ULIS(6)

2. Declaration of avoidance

55. Necessity of notice

Art. 64 of the Convention entitles the seller to declare the contract avoided if either the buyer's breach is fundamental or the requirements of an additional time notice are met. Both concepts have already been examined in this work.(1) A similar approach is followed by ULIS only where the contract is not ipso facto avoided.(2)

On the other hand, Art. 26 of the Convention reads: "A declaration of avoidance is effective only if made by notice to the other party."(3) Although ULIS does not contain a similar provision, Art. 62.1 is quite clear to the effect that the seller's declaration of avoidance, where it is based on the fundamental breach, must be informed to the buyer, otherwise the contract subsists until the expiration of such reasonable time whereupon it becomes avoided automatically.(4) As to

---

54- 6) Cumming, 9 Cal. W. Int. C. J. 1979, p 157, 175.

55- 1) This Ch., ss.I and II respectively.

2) See Arts.62.1 (supra,para.17) and 62.2 (supra, para.34).

3) For a legislative background of the text, see the following documents successively: A/CN.9/87, para.40 (art.72 bis),and annex 1 (art.72 bis); A/CN.9/100, para.98; A/CN.9/116 (art. 10); A/32/17, annex 1, paras.97 ff, and para.35 of the original document (art.9); A/33/17, para.28 (art.24); A/CONF.97/19, pp 99(art.24), 303 (para. 17), 157 (art.24) =

avoidance on the ground of an additional time notice, it is assumed that the mere declaration of avoidance, which is provided for in Art. 62.2,(5) would have no effect unless it is communicated to the buyer for it seems to be unsound to require such declaration without requiring its communication. This assumption, moreover, is in conformity with the principle of good faith prevailing in international trade.

So that, giving a notice of avoidance by the innocent party to the other is a prerequisite to avoiding the contract under the Convention and, to the above extent, ULIS as well. This principle is of general nature where it applies to all cases of avoidance whether it affects the whole contract or only part of it,(6) and irrespective of whether it is based upon an actual or anticipatory breach.

56. English Law

In English Law, by contrast, various rules are well-established and may be summarized as follows.

Firstly, the decision of avoidance is treated as an "acceptance" to the defaulting party's breach(1) which has

---

55- =) and 206 (para. 18).

4) Supra, para. 47A.

5) Supra, para. 34.

6) See post, para. 79.

56- 1) See, eg, Bradley v. H. Newsom, Sons and Co. [1919] A.C.16, 51-52; Decro-Wall International S.A. v. Practitioners in Marketing [1971] 2 All E.R. 216,227-228; Denmark Productions Ltd. v. Boscobel Productions Ltd. [1969] 1 Q.B. 699, 731-732; Golding v. London & Edinburgh =

been characterized as an "offer" to put an end to the contract.(2) In considering the rules of acceptance, therefore, a party must communicate his acceptance to the offeror,(3) which is the same in case of electing avoidance.(4) In other words, the innocent party must make the other known of his decision of avoidance.(5)

Secondly, an acceptance may be implicitly inferred from the offeree's conduct,(6) and it seems that a similar principle applies to the decision of avoidance where it has been held that rescission of the contract, in the meaning of avoidance,(7) is a question of fact.(8)

Moreover, it has been argued that the avoidance could be exercised in the proceedings brought on the contract.(9) This may be the case, in particular, when the non-defaulting party brings an action for damages on the footing of the other's

---

56- =) Insurance Co. Ltd. (1932) 43 Lloyd's Rep.487, 488; Heyman v. Darwins Ltd. [1942] A.C.356, 361; The Odenfeld [1978] 2 Lloyd's Rep. 357, 374.

2) Denmark Productions case, ibid; Bradley case, ibid.

3) See generally Cheshire,Fifoot & Furmston, pp 41 ff; Chitty, vol. 1, paras.64 ff; Halsbury's Laws of England, vol. 9, para. 254; Treitel, Law of Contract, p 18.

4) Halsbury's Laws of England, ibid, para. 556.

5) Cheshire, Fifoot & Furmston, p 492.

6) See generally Cheshire, Fifoot & Furmston, p 32; Chitty, para.55; Halsbury's Laws of England, ibid, para.252; Treitel, ibid, p 15.

7) See supra, para.14.

8) Kish v. Charles Taylor, Sons and Co. [1912] A.C.604, 617.

9) Treitel, ibid, p 688.

breach.(10) Similarly, the seller may, as already mentioned,(11) exercise his right of avoidance by reselling the goods when such resale is based on either a statutory or contractual power.

This approach of English Law is plainly different from that followed by the Convention and ULIS where a declaration of avoidance under both laws, but without ignoring ipso facto avoidance under the latter, is always necessary before resorting to this remedy. However, the first rule under English Law, which applies as a general rule, is broadly comparable to the principle of "declaration of avoidance" in ULIS and the Convention.

57. Sellers' silence

The general rule prevailing in the Convention is that the seller's silence, how long it lasts after the buyer's breach, may never lead to avoiding the contract automatically, nor to affirming it in the sense that he loses his right of avoidance.(1) Simply, the unpaid seller, who is entitled to

---

56- 10) Ibid, p 642; see also Dawson, 40 C.L.J. 1981, pp 83,89-90 who argues that the innocent party in case of anticipatory breach need not, when he is the defendant, communicate his intention. But cf., Beale, p 109 who says that the aggrieved party must notify the other if he wishes to terminate the contract by accepting the anticipatory breach.

11) Supra, paras. 39, 49.

57- 1) Cf., in case of anticipatory breach (post, para.66) and of instalment contracts (post, para. 75). Cf., also CITC under which the innocent party must declare avoidance without =

declare avoidance, remains having this right so long as the buyer has neither paid nor duly tendered the price.(2)

This is not, of course, the position of ULIS. As was indicated, in one case a seller, who has the option between declaration of avoidance and demanding performance, must inform the buyer of his decision within a reasonable time, otherwise the contract shall be ipso facto avoided;(3) that is to say, that his mere silence leads to an automatic avoidance. In another case,(4) he must declare avoidance, if he prefers it, promptly or else his silence means, as submitted, that he has affirmed the contract in the sense that he cannot resort to avoidance unless some other grounds justifying avoidance come into existence.

Unlike ULIS, the seller's silence in English Law may never lead to an automatic avoidance; contrary to that, it may be construed, in certain circumstances, as an affirmation of the contract depriving him of avoidance.(5) In other words, if a seller who has a right of option unnecessarily delays in taking

---

57- =) undue delay, or else he cannot resort to it; this remedy, however, revives upon giving an extra time notice for performance (ss.235.1, 237.2).

2) Supra, para. 46;see also supra, para. 45.

3) Supra, para. 48.

4) Supra, para. 46.

5) Denmark Productions Ltd. v. Boscobel Productions Ltd. [1969] 1 Q.B.699,731-732; The laconia [1977] 1 All E.R.545, 551, 556-59; see, further, Dawson, p 90; Halsbury's Laws of England, vol. 9, para. 559; Thomson, p 142.

his decision, he may not be entitled to resort to avoidance any more.(6)

58. Form of notice(s)

The Convention does not require that a notice of avoidance must be made in a particular form or by a specific means of communication; and this was the clear position of the draftsmen where all suggestions opposing this principle were expressly rejected.(1) This would suggest that the notice may be given in any form and by any means of communication whatsoever. It should be emphasized that this rule is not confined to the notice of avoidance; rather, it applies to all notices provided for in the Convention.(2) If, however, any notice has been given by means not appropriate in the circumstances, the seller would, as will be seen below, bear the risk of its transmission.

It seems that ULIS adopts a similar rule where Art. 14 reads: "Communications provided for in the present Law shall be made by means usual in the circumstances." The question is therefore dependent on the circumstances of each particular case;(3) in a given case, a registered letter may be necessary

---

57- 6) Allen v. Pobles [1969] 1 W.L.R. 1193; The Iaconia, ibid; The Mihalios Xilas [1976] 3 All E.R. 865, 876.

58- 1) Such as the suggestion that the notice must be made in writing (A/CN.9/125, add 1, comment of USSR on art.10) or, alternatively, be immediately followed by written notice (A/32/17, annex 1, para. 102).

2) See also Honnold, Uniform Law, para. 130. Likewise, CITC expressly provides that no special form is required for legal acts (s.24.1); as to the definition of a legal act, see s.22.1.

while a telephone call may be sufficient in another. It is assumed, however, that the failure to comply with the method of communication does not mean the nullity of the notice; it simply means that a party who gives it would run the risk of its transmission if, for instance, it fails to arrive in time.(4)

59. Time of effectiveness

A valid notice of avoidance terminates the contract and the question which may then arise relates to the time at which such notice becomes effective. This question is of course confined to the situation in which the parties are absent from each other, and neither the means of communication is instantaneous, eg, telephone or telex,(1) nor there is an agreement concerning this matter.(2)

58- 3) A/CN.9/116, annex 1, comment on art.10, para.3; A/CONF.97/5, comment on art. 25, para. 3.

4) Cf., Graveson and Cohn, p 60 where it is said that a communication made in an unusual manner would appear to be satisfactory if it reached the addressee in due course and was not promptly (Art.11) rejected by him. Cf., also, the judgement declared in W.Germany, supra, para.53, note 3.

59- 1) But if the knowledge theory is to be considered, which is not the case in international trade law, the same question arises even with relation to communications made by telex if, eg, the notice has been received by the addressee who could not, for any reason, get actual knowledge of its content until few days later.

2) As a rule, the contracting parties are free to vary or modify any provision stated under either ULIS or the Convention (supra, para. 21).

No answer to this question could be found under ULIS and, therefore, it depends according to Art. 17 on the general principles on which ULIS is based. However, it seems to be well-admitted in international trade law to adopt either the despatch or the receipt theory.(3) But the adoption of the former in connexion with the various notices provided for by ULIS is, presumably, in line with Art. 14 which has just been mentioned. Accordingly, one may well say that the general rule under ULIS is as follows: if any notice has been given by an appropriate means of communication, the addressee would run the risk in its transmission (the despatch theory),(4) otherwise the sender would run it (the receipt theory).

As to the Convention, the draftsmen obviously refused the receipt theory(5) and, instead, Art. 27 has been adopted. This article reads: "unless otherwise expressly provided(6) in this Part of the Convention,(7) if any notice, request or

---

59- 3) As to the receipt theory, see, eg, art.8 of ULF; s.25 of CITC; Arts.25,47.2, 48.4,63.2 and 65.1 of the Convention; the ECE General Conditions of Citrus Fruits (s.2.1) and of no. 420 (s.2.1); s.1.1.b of COMECON General Conditions of Delivery of 1968. As to the despatch theory, see, eg,s.2.1 of nos.188,574,188A,574A and s.2 of no.730 of ECE General Conditions; Art.39 of ULIS.

4) It is worth noting that ULIS expressly adopts the despatch theory in respect of the buyer's notice of non-conformity of goods (Art.39.3).

5) See A/32/17, annex 1, para.99.

6) For an illustration of this, see supra, para.47.

7) Ie, Part III (sale of goods) under which the various provisions relating to the declaration of avoidance fall.

other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication."

Apart from the wording of the text which refers, as clear, to the main effect of the despatch theory rather than to the theory itself, a clear tendency, while setting the text, was to adopt this theory.(8) But this is subject to an essential requirement, that is, the notice must be despatched by an appropriate means of communication; otherwise it is suggested to apply the receipt theory which is the alternative, as has just been seen, in international trade law in general and particularly in the Convention. In addition, it seems to be wise to conclude that the risk in transmitting the notice is to be born by the party who has chosen such inappropriate means of communication.

59- 8) See A/CONF.97/19, p 303, paras. 20-23.

Section IV

Avoidance in Particular Cases

1. Anticipatory breach

60. Texts

Art. 76 of ULIS provides that:

"Where prior to the date fixed for performance of the contract it is clear that one of the parties will commit a fundamental breach of the contract, the other party shall have the right to declare the contract avoided."

While Art. 72 of the Convention provides that:

"1-If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

2-If time allows, the party intending to declare the contract avoided must give reasonable notice to the other party in order to permit to provide adequate assurance of his performance.

3-The requirements of the preceding paragraph do not apply if the other party has declared that he will not perform his obligations."(1)

60- 1) For a legislative background of the text, see the following documents successively: A/CN.9/87, annex 2, comment on arts. 75-77 of ULIS, paras.5 ff, and paras.128 ff of the original document; A/CN.9/116, annex 1 (art.49); A/32/17, annex 1, =

A. Requirements of the doctrine

61. Generally

The doctrine of anticipatory breach finds its substance in Common Law system(1) and has no counterpart in Civil Law in general.(2) In its origin, it is based on two principles.(3) Firsly, that the time for performing the contract has not yet matured. Secondly, that the defaulting party, say the buyer, has shown his intention that he will not make payment when it falls due.

The doctrine as such demonstrates a notable difference between English Law on the one hand,and, on the other, both ULIS and the Convention. This would be seen below, suffice it here to say that the seller is entitled upon the buyer's anticipatory breach to avoid the contract and to a claim for damages as well.(4)

60- =) paras. 428 ff, and para.35 of the original document,(art.49); A/33/17, para.28 (art.63); A/CONF.97/19, pp 130-131,378, 419-422,163 and 221 (para.30)

61- 1) See the leading case of Hochster v. De la Tour (1853) 2 E & B,678; 118 E.R. 926. (An employment contract where prior to the date fixed for performance the defendant announced that he would not perform. Held: that the plaintiff was entitled to an immediate action for damages).

2) Treitel, Remedies, s.177; Williston on Contracts, s.1337A. But see Gullota, 50 Tul.L.Rev., p 927 who says that the doctrine of anticipatory breach has recently been admitted by various cases in Louisiana.

3) See, eg, Hochster case; ibid, Mersey Steel & Iron Co. v. Naylor, Benzon & Co. (1884) 9 A.C.434, 442; Johnstone v. Milling =

62. Grounds for breach

Avoidance on the ground of anticipatory breach under both ULIS and the Convention turns on whether "it is clear"(1) that one of the contracting parties, say the buyer, will commit a fundamental breach as to payment of the price when it matures. But the source or ground of such "clarity" is irrelevant;(2) it may be concluded, for example, from the buyer's express or implicit intention that he will not perform, or from his apparent financial situation such as his insolvency, or even from any other reason beyond his control as, for instance, currency restrictions imposed by his country.(3)

But this is not the case in English Law or the doctrine itself as established and developed in Common Law. Originally, this doctrine came into existence where one of the contracting parties had unequivocally declared, before maturity of

---

61- =) (1886)16 Q.B.D. 460, 468; Universal Cargo Carriers Corporations v. Citati [1957] 2 Q.B.401, 436.

4) See, eg, Mersey case, supra, 442-443; see further post, paras. 65 f.

62- 1) As to the word "clear", see the comment of France in A/CN.9/87, annex 3, para.19; cf., CITC (s.242) where the word "obvious" has been used.

2) See also A/CN.9/116, annex 2, comment on art.49, para.2; A/CONF.97/5, comment on art.63, para. 2.

3) Cf., art.87 of draft ULIS (1956) which provided that the anticipatory breach should be based on the conduct of either party, that is to say that he disclosed his intention to commit a fundamental breach.

performance, that he would not perform his obligations when they matured.[4] In a later stage, it was admitted that the intention not to perform might be implicitly inferred from conduct[5] and so the situation until now.[6] In other words, the anticipatory breach occurs only where a party shows by words or conduct that he will abandon the contract.[7]

Indeed, it is difficult to justify the Convention's and ULIS' approach in widening the scope within which the anticipatory breach operates. This appears to be so strange when emphasizing that the buyer's breach remains anticipatory and not actual, at least in the case where it is based on grounds other than his words or conduct. But the notion of adequate assurance as recognized by the Convention, which is discussed below,[8] would mostly reduce the cases of avoidance on the ground of anticipatory breach. In English Law, however, it may be interesting to note that such breach, though it is described as anticipatory, is not in fact so but, rather, an actual breach since it is based, as has been held, on the promisor's repudiation to his promise and that is wrongful.[9]

62- 4) Hochster case, supra.
5) Frost. v. Knight (1872) 41 L.J.Ex. 78.
6) Cheshire, Fifoot & Furmston, p 484.
7) Benjamin, para.1237. But see Universal Cargo case, supra, 438 where it has been held that "...if a man says I cannot perform, he renounces his contract by that statement and the cause of inability is immaterial."
8) Para.67; and for further details of this idea, see post, para. 180.
9) Bradley v. H. Newsom, Sons & Co. [1919] A.C.16,53; see also Cheshire, Fifoot & Furmston, p 484, note 8.

63. Degree of breach

The condition that the buyer's anticipatory breach which justifies the avoidance must be fundamental in the meaning discussed above[1] is agreed upon by ULIS and the Convention.[2] In English Law too it has been considered that such breach must be substantial (i.e, fundamental)[3] or that it comes to an exception to that requirement.[4] One of the main exceptions concerning this matter is the breach of a "condition" strictly so-called.[5] Conceding that the parties are absolutely free to consider any term as a "condition",[6] this means that the doctrine of anticipatory breach in English Law extends to cover the parties' agreement. By contrast, it must be remembered that neither ULIS nor the Convention applies to the extent that there is a (valid) agreement different from that provided for in either.[6]

64. Time of breach

It is quite true that the time at which it becomes clear that the buyer will commit a breach in future must generally be before maturity of payment,[1] and this is in fact one of

---

63- 1) Supra, this Ch., s .I.
2) See the texts of both in para.60, supra.
3) Treitel, Law of Contract, p 644; see also Beale, p 646; Swanton, 13 M.U.L.R. 1981, p 69, 71.
4) Treitel, ibid.
5) Ibid, p 592.
6) Supra, para. 21.

64- 1) Cf., post, paras.69,73 (instalment contracts).

the main features underlying the doctrine of anticipatory breach. However, it might happen in practice that the grounds on which such breach is based already existed at the time of making the contract and the seller, nevertheless, entered into the contract with the buyer. Suppose, for instance, that at the time of the contract the buyer was bankrupt or insolvent, or that currency exchange restrictions were imposed by his country to the extent that it was "clear" that he would commit a fundamental breach when time of payment falls due. In these circumstances, the qeustion which may arise is whether the seller could turn on such grounds for avoiding the contract.

A literal reading of the relevant provision under either ULIS or the Convention may give a positive answer since "... prior to the date ... for performance it is clear that one of the parties will commit a fundamental breach" of the contract; and nothing in either indicates that such "clarity" must necessarily be after making the contract. But doubts may be expressed as to whether this result is intentionally intended, and it is indeed difficult to justify the avoidance in such circumstances. In brief, it is suggested that the avoidance on the ground of the anticipatory breach necessarily requires that such breach becomes clear (only) after the contract was made; this understanding, moreover, is in line with the doctrine of "prospective" breach as recognized by both ULIS and the Convention which is parallel to the "anticipatory breach(3).

(2)

64- 2) See the texts of both in para.60, supra.

65. Seller's option

Like an actual breach,(1) the seller is not bound in case of anticipatory breach to avoid the contract but, rather, he may affirm it and consider the circumstances from which the breach is inferred as never having taken place. This principle, which is well-established in English Law,(2) is in conformity with the language used in both ULIS and the Convention.(3) But it must be noted that the seller would run in these circumstances, as has been held, the risk of his decision(4) if, for instance, some events impeding the buyer's performance(5) have occurred after the affirmation.

Instead of affirmation, however, the seller may, according to English Law(6) and ULIS,(7) avoid the contract. In other words, he has a right of option either to avoid or to affirm the contract. In contrast, this is not exactly the situation under the Convention where in certain circumstances the seller's request of an adequate assurance for performance and the buyer's failure to comply with it is a condition

---

64- 3) Post, paras.164 f.

65- 1) For further details, see supra, paras.49 and 52.
2) Supra, para.49; cf., however, post, para.110.
3) See the texts of both in para.60, supra; see also post, para. 110.
4) Johnston v. Milling (1886)16 Q.B.D. 460, 470.
5) For further details, see the doctrine of "exemption", post, Ch.,IV.
6) Supra, para. 49.
7) See Art. 76, supra, para. 60.

precedent to the remedy of avoidance,(8) while in others he has a right of option similar to that given to him by ULIS and English Law.

66. Avoidance

Thus, the seller may avoid the contract on the ground of the buyer's anticipatory breach, and it is important in this connexion to emphasize the following points:-

Firstly, the seller's silence in English Law may in certain circumstances lead to affirmation of the contract and, accordingly, he may be deprived of later avoidance.(1) There is no provision to this effect in either the Convention or ULIS. But in case of delivery by instalments, a seller who seeks avoidance for the future must do so within a "reasonable time" in the Convention or "promptly" in ULIS; otherwise, it is assumed that he cannot resort to this remedy.(2) Bearing in mind that avoidance in that case is by all means an application of the doctrine of anticipatory breach, it may be sound, therefore, to apply a similar principle to the doctrine in general.

Secondly, in avoiding the contract the seller is entitled to an immediate action for damages.(3) The rules of damages

---

65- 8) See post, para. 67.

66- 1) Supra, para.57.
2) Post, para. 75.
3) See Arts.81.1 of the Convention (effects of avoidance in general) and 77 of ULIS. As to English Law, see supra, para.61, and the authorities cited therein particularly =

in general are to be sought elsewhere in this work;(3a) but it is assumed in both the Convention and ULIS that if the anticipatory breach is based on events or circumstances other than the buyer's intention not to perform, the latter would not be liable for damages.(4)

Thirdly, the seller would run the risk of his decision concerning avoidance(5) which is the same, as already seen, in case of actual breach.(6)

Finally, the seller loses his right as to avoidance if, before exercising it, the buyer has provided him an adequate assurance, which will be considered below.

67. Adequate assurance

The concept of "adequate assurance" as provided for in the Convention has its parantage in various domestic laws,(1) but as such has no equivalent in either ULIS(2) or English Law.(3) It is quite plain that the purpose of which is to

---

66- =) in note 3.

3a) Post, Ch., II.

4) A/CN.9/116, annex 2, note 78; A/CONF.97/5, comment on art. 63, note 1. But cf., the comment of U.S. on Arts.76-77 of ULIS and the reply of Hungary, in A/CN.9/87, annex 3, paras.7 and 21.

5) A/CN.9/87, annex 3, para.21; A/CN.9/116, annex 2, comment on art.49, para.4; A/CONF.97/5, ibid, para. 3.

6) Supra, para. 36.

67- 1) Post, para. 180.

2) But cf., post, para. 180.

3) See generally Beale, pp 77 ff.

reduce the cases of avoidance when it is based on the anticipatory breach. This concept, however, consists of a general principle and an exception.

The general principle is that a seller who seeks avoidance must, if time allows,(4) give the buyer a reasonable notice demanding him to provide an adequate assurance guaranteeing payment when it falls due. In such a case, the buyer's failure to comply with the notice is a pre-requisite for avoidance.

The exception is that the above rule does not apply to such buyer who has declared that he will not make payment.(5) In that case, the seller is entitled to avoid the contract without being bound to request the providing of assurance even if time allows that. The buyer's intention in this respect must be clear to the effect that "he will not perform", or else the exception does not apply;(5) for example, when he requests the seller to extend the time for performance.

What constitutes an adequate assurance will vary with the circumstances.(6) Several examples of this will be given later(7) and it may suffice here to emphasize that trade usages, pre-dealings between the parties and good faith(8) in international trade will play a great part in solving this problem.(7)

67- 4) Cf., s.242 of CITC where demanding a "security" is required in all cases of avoidance when based on anticipatory breach.
5) See, by way of contrast, supra, para. 47.
6) Beale, ibid.
7) For further details, see post, para. 180.
8) See also Comment 3 on s.2-609 of UCC.

It is suggested, on the other hand, that the buyer may always avoid "avoidance" of the contract by providing an adequate assurance even if the seller has not requested him to do so; for the latter becomes having no interest in resorting to that remedy so long as payment has duly been secured.

Finally, it might be preferable had the Convention not restricted the demanding of assurance by the phrase "if time allows" especially when recalling that the breach is merely anticipatory.(9) In practice, however, the modern instantaneous means of communication, as has rightly been observed, would normally permit such request without undue hampering the seller's freedom of action.(10)

2. Delivery by instalments

68. Texts

Art. 75.1 of ULIS provides that:

"Where, in the case of contracts for delivery of goods by instalments, by reason of any failure by one party to perform any of his obligations under the contract in respect of any instalment , the other party has good reason to fear failure of performance in respect of future instalments , he

---

67- 9) There were several suggestions before the Conference to delete that phrase but all had been rejected, see A/CONF. 97/19, p 432, paras.1 ff, p 131 (art. 63), para. 10.

10) Honnold, Uniform Law, para. 398.

may declare the contract avoided for the future, provided that he does so promptly."

While Art. 73.1, 2 of the Convention provides that:

"1- In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach of contract with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

2- If one party's failure to perform any of his obligations in respect of any instalment gives the other party good grounds to conclude that a fundamental breach of contract will occur with respect to future instalments, he may declare the contract avoided for the future, provided he does so within a reasonable time."(1)

69. Introduction

The peculiarity of delivery by instalments in both the Convention and ULIS is that it lumps together the actual and anticipatory breach. It presumes two main facts:- firstly, delivery of goods is to be made by instalments; secondly,

---

68- 1) For a legislative background of the text, see the following documents successively:- A/CN.9/87, annex 3 (comments on Arts.75-77 of ULIS); A/CN.9/87, paras.116-127; A/CN.9/100, annex 1, art.48(74); A/CN.9/116, annex 1 (art.48); A/32/17, annex 1, paras. 421-427, and para. 35 of the original document (art.50); A/33/17, para. 28 (art.64); A/CONF.97/19, p 221, para. 31.

the buyer has actually violated the contract in respect of one or more instalments. In that case, the seller may be entitled to avoid the contract in respect of those instalments already violated as well as future instalments. While the ground of avoidance in the former situation is the actual breach, it is the anticipatory breach in the latter.

70. English and French Law

Delivery by instalments as provided for in both the Convention and ULIS is a Common Law notion and has then been adopted by the SGA.(1) Section 31.2 of the Act, which will be considered below, provides that:

"Where there is a contract for the sale of goods to be delivered by stated instalments , which are to be separately paid for, and ... the buyer neglects or refuses to ... pay for one or more instalments , it is a question in each case depending on the terms of the contract and the circumstances of the case whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to

---

70- 1) See generally Atiyah, pp 337 ff; Benjamin, paras.636 ff; Chalmer's Sale of Goods, 18th ed., pp 183 ff; Chitty vol.2. paras.4261 ff; Schmitthoff, Sale of Goods, pp 130 ff; see also OLRC Report, vol. 2, pp 541 ff.

treat the whole contract as repudiated."(2)

No similar provision could be found in French Civil Code; nor is this idea as such known to French Lawyers. Instead, there is what so-called in the general law of contract "contrat successif"(3) in which the obligations are performed in succession over a period of time, eg., a sale of goods by instalments.(4) In this kind of contracts, avoidance, contrary to the general rule,(5) operates prospectively and not retrospectively. Although this is generally a main feature of delivery by instalments in the Convention and ULIS,(6) the notion as a whole is quite familiar to Common Law rather than to French and may-be Civil Law in general. In the Convention, for example, avoidance in instalment contracts is based upon two concepts, i.e., the "fundamental" and "anticipatory" breach; as indicated above, both are Common and not Civil Law ideas.(7)

70- 2) This sub-section is based on decisions before the Act(1893), and its language is substantially based on the language used in Mersey Steel and Iron Co. v. Naylor, Benzon and Co. (1884)9 A.C.434;see Maple Flock Co. Ltd. v. Universal Furniture Products (Wimbley) Ltd. [1934] 1 K.B.184,154-155.

3) See generally Colin et Capitant, vol. 2, 1959, paras.579 f; Marty et Raynaud, para.67; Mazeaud, t.2, v. 1, paras.109 f; Planiol et Ripert, vol. 6, para.45; see also Briere, in D. and S. 1957, chronique, p 153.

4) Mazeaud, ibid, para. 109; cf., Planiol et Ripert, ibid.

5) Post, para. 79.

6) Post, paras. 74 f; but cf., post, para. 79.

7) Supra, paras. 19 and 61 respectively.

71. Several deliveries

The contract calls for the delivery by instalments whenever the seller is required or authorized to deliver the goods in separate lots,(1) but the amount of each lot is irrelevant. Dividing delivery into instalments might be inferred from the contract itself(2) or the surrounding circumstances.(3) Otherwise, the buyer is not bound to accept delivery by instalments,(4) nor is the seller bound to make such delivery.(5)

Moreover, any instalment need not be "stated" in the contract although a literal reading of s.31.2 of the SGA may lead to a different understanding.(6) As seen above, this subsection provides that delivery under instalment contracts is to be made by "stated instalments". So, for instance, if deliveries were not to be made by "stated instalments" specified in the contract but rather at the option of either party,(7) which is familiar in practice, the subsection may not be applied.

71- 1) A/CONF.97/5, comment on art.64, para.1; see also s.8.10(1) of DUSA; s.2-612(1) of UCC; see further Regent OHG Aisenstadt und Barig v. Francesco of Jermyn Street Ltd. [1981] 3 All E.R. 327.

2) Brandt v. Lawrence (1876)1Q.B.D.344, 347; Howell v. Evans (1926)134 L.T. 570.

3) The Colonial Insurance Co. of New-Zealand v. The Adelaide Marine Insurance Co. (1886)12 A.C.128, 138.

4) S.31.1 of the SGA; Behrend and Co. Ltd., v. Produce Brokers Co. Ltd. [1920] 3 K.B.530, 534-535.

5) Kingdom v. Cox (1884)5 C.B. 522; 136 E.R. 982.

6) See Benjamin, para.649; see also Regent OHG case, supra.

7) OLRC Report, vol.2, p 545.

But this is not law where it is considered that a similar principle applies even if the instalments are not "stated".(8)

However, there are many situations where the contract may call for both delivery and payment by instalments, yet it may not be considered as an "instalment contract" in the meaning intended for this term. For example, the subject-matter of the sale may amount to an integrated whole, such as a machine set to be delivered in lots; payment is to be made by instalments but not apportioned to deliveries. In that case, if the buyer fails to make any payment, the seller's avoidance, which is presumed to affect the whole contract, may only be based upon the doctrine of actual breach.(9)

72. Several contracts

On the other hand, the concept of instalment contracts is normally connected with only one contract. So, for instance, if the same buyer and seller have entered into two separate

---

71- 8) Benjamin, ibid.

9) Both the Convention and ULIS provide for the buyer's right to avoid the contract in respect of deliveries already made if certain requirements are satisfied. No corresponding right is given to the seller in either, see Arts.75.2 of ULIS and 73.3 of the Convention; see also Benjamin, para. 653 (but cf., ibid, note 16); OLRC Report; ibid, p 544; A/CONF.97/5, comment on art.64, paras. 4, 7 f; see further Graveson and Cohn, p 97; but cf., CITC whereby the creditor may repudiate the contract in respect of deliveries already received, if such received instalments alone are of no economic value for him (s.241.2).

contracts and the former violates one of them, the seller cannot avoid the other unless avoidance is based on the anticipatory breach in general.

But it may happen in practice that a contract provides that each delivery should be treated as a separate contract, and the buyer may violate the contract in respect of one or more deliveries; in this setting, the question is whether the seller can turn on such a breach for avoiding the whole contract.

Again, a strict construction of s.31.2 of the SGA(1) and the Convention as well may give a negative answer since both expressly refer to "a contract" for delivery by instalments.(2) Indeed, this is not the situation in English Law,(3) and such a term does not normally divide the contract into a number of separate contracts.(4) There is still only one contract though for certain purposes, in the way of performance, particular instalments may be treated in separation from the others; and it is assumed that a similar construction may also be given to the Convention.

72- 1) See generally OLRC Report, ibid, pp 543 ff.

2) Cf., the wording of Art.75.1, of ULIS, supra, para.68.

3) Benjamin, para. 648.

4) Schmitthoff, Sale of Goods, p 130.

5) Ross T. Smyth and Co. Ltd., v. T.D. Bailey, Son and Co. [1940] 3 All E.R.60, 73. A similar approach is followed by both UCC (s.2-612,1) and DUSA (s.8.10,1).

73. Buyer's failure

The concept of instalment contracts as laid down by the Convention and ULIS presumes, in addition to dividing delivery into instalments, that the buyer has committed an actual breach in respect of one or more instalments. But it should be noted that the buyer's breach is not confined to his failure to make payment; on the contrary, it includes any other failure whatsoever[1] such as his failure to take delivery of the goods.

Certainly, payment of the price and taking delivery of the goods are the most important obligations imposed upon the buyer, but of course they are not comprehensive. In many situations, the buyer may be bound to perform other duties such as his duty to accept the goods[2] or, in fob contracts, to nominate a vessel on which the goods would be loaded.[3]

In contrast, a literal reading of s.31.2 of the SGA, which clearly restricts the buyer's failure to either non-payment or non-taking delivery, may lead to the conclusion that it does not apply to these situations or the like.

On the other hand, one may well say that under the Convention and ULIS it is not necessary for considering the sale by

---

73- 1) Arts.75.1 of ULIS and 73.2 of the Convention, supra, para.60. A similar rule is provided for in CITC (s.241.1).
2) The SGA seems to make a distinction between the buyer's duty of acceptance and taking delivery of goods (Benjamin, para. 673).
3) On the assumption that this obligation is other than taking delivery of the goods. But cf., Arts.60(a) of the Convention and 65 of ULIS.

instalments that payment should also be divided into parts. In many cases, the contract may require that all the price must be paid at one time and it may nevertheless be considered by instalments. Suppose, for example, that a contract calls for three deliveries; the price is to be paid at one time after the second delivery which the buyer has refused to take.

In this setting, the seller may be entitled to avoid the contract in respect of that instalment as well as the future one. So long as payment could be apportioned to deliveries, the seller cannot, as submitted, resort to avoidance in respect of the first instalment which has already been delivered provided that the buyer is ready, by offering performance or otherwise, to pay for it.(4)

If this understanding is correct, another difference may then appear between the SGA on the one hand, and, on the other, both the Convention and ULIS. As already seen, s.31.2 of the Act expressly provides that the "stated instalments ... are separately to be paid for",(5) which means, in other words,

---

73- 4) Cf., supra, para.71 . See, however, A.A. Nortier and Co. v. WM. Maclean, Sons and Co. [1921] 9 Lloyd's Rep.192. In this case, it was clear that payment of the whole price was to be effected at one time; the seller delivered part of the goods in time while he delayed in delivering the others which the buyer refused to accept.Held: the seller was entitled to an action for the price only in respect of the first delivery. See also Behrend and Co. Ltd., v. Produce Brokers Co. Ltd., [1920] 3 K.B.530, where the price was also apportioned to the deliveries.

5) See also H. Longbottom and Co. Ltd. v. Bass, Walker and Co. [1922] W.N. 245, 246.

that payment of the price must also be divided into instalments. Otherwise, the apparent meaning of these words is that this sub-section would not apply.

74. Avoidance of violated instalments

Suppose, for example, that a contract calls for delivery by instalments where each instalment is to be separately paid for and the buyer has refused to pay for one instalment. In that case, the seller is entitled under the Convention(1) to resort to partial avoidance in respect of that instalment(2) on condition that the buyer's breach is fundamental.(3) The doctrine of fundamental breach has already been discussed in this study,(4) but it may be important to add two further points.

Firstly, whether or not the breach is fundamental, is to be considered in respect of the instalment so violated and not to the whole contract.(5) Secondly, it is assumed that the

---

74- 1) Art.73.1, supra, para. 68.
2) See also s.8.10(2) of DUSA whereby the seller's rights and remedies with respect to breach by the buyer to any instalment are the same as if it were a separate contract; see also s.9.5(1)a.
3) It is noteworthy that the avoidance could be exercised in that case even though the buyer's failure does not justify avoidance as regards future deliveries (below, para. 75; see also A/32/17, annex 2, para.423 but cf., art.48 of the draft convention as approved by the W.G.
4) Supra, this Ch., s.I.
5) See A/CONF.97/5, comment on art.64 para.3; Honnold, Uniform Law, para.400.

doctrine of the additional time notice may constitute a good ground for avoidance instead of fundamental breach.(6) In other words, the seller may give the buyer a reasonable time notice for performance and if it expires without performance, the former would be entitled to resort to avoidance irrespective of the degree of breach.(7)

However, neither the SGA(8) nor ULIS contains a provision similar to that established in the Convention. But since the notion of an "instalment contract" is based upon its divisibility where each instalment is assumed to be treated as if it were a separate contract,(9) it may be sound, therefore, to apply the same principle under both English Law(10) and ULIS.

75. Avoidance of future instalments

In addition, the seller may be entitled to avoid the contract in respect of future deliveries, which appears to be the main purpose of the whole idea of delivery by instalments.

74- 6) Supra, this Ch., s.II.
7) Supra, paras. 35 f.
8) See OLRC Report, vol. 2, p 552.
9) See Calamari and Perillo, Contracts, 2nd ed., s.11.27; see also s.8.10(2) of DUSA (note 2, above).
10) Notwithstanding that s.31.2 speaks of a severable breach "giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated", see OLRC Report, ibid,pp 551-552; see further Benjamin, para.655.

This is the situation in the Convention, ULIS[1] and English[2] Law although different tests have been used for that purpose. Before considering these tests, it is important to note that the degree of the buyer's actual breach in both the Convention and ULIS is irrelevant to that effect;[3] though it might be taken into consideration when ascertaining whether the appropriate test has been satisfied.[4]

Under the Convention, the test depends on whether the buyer's actual breach gives the seller "good ground to conclude that a fundamental breach will occur" or, in the language of ULIS, "good reason to fear failure of performance" in respect of future deliveries. So it is quite clear from the former words, that the (anticipatory) breach should be fundamental in the meaning discussed above.[5] A requirement as such

---

75- 1) See the texts of both, supra, para.68.

2) According to s.31.1 the same principle applies whether the defaulting party is the buyer or the seller.As to illustrations from the case law, see Freeth v. Burr (1874)43 L.J.C.P.91; Hoare v. Rennie (1859)29 L.J. EX.73; Jonassohn v. Young (1863)32 L.J.Q.B.385; Maple Flock Co. Ltd., v. Universal Furniture Products (Wembley) Ltd., [1934] 1 K.B.148; The Mersey Steel and Iron Co. v. Naylor, Benzon and Co.(1884)9 A.C.434; Millar's Karri and Jarrah Co. v. Weddel Turner and Co. (1908)14 Com.Cas. 25; Withers v. Reynolds (1831)2 B. and Ad. 882;(109)E.R.1370 .

3) As to the Convention, see also A/CN.9/116, annex 2, comment on art.48, para.4; A/CONF.97/5, comment on art.64, para. 6.

4) See the Maple case, supra, 157.

5) Supra, this Ch., s.I.2 and 3.

is obviously missed in ULIS, but it may be possible to require it according to the principles on which the anticipatory breach in general is based.(6)

Further, the Convention does not require for avoidance that the seller must first give the buyer an opportunity to provide an adequate assurance for performance even if time allows that. This approach is obviously different from that followed in the anticipatory breach in general.(7) The reason is, perhaps, that avoidance for the future under an instalment contract presumes that the buyer has already violated the contract, and it is therefore reluctant to protect such a buyer.

Another difference between the Convention and ULIS calls for attention. According to the former, the seller who seeks avoidance for the future must do so "within a reasonable time", while the term "propmtly"(8) has been used in the latter. In spite of that, it is worth noting that the wording of either leaves the question to the circumstances of each case. It is assumed too that the seller who unduly delays in exercising avoidance may, in both the Convention and ULIS, lose that right unless some new grounds come into existence.(9)

75- 6) Supra, para. 63.

7) Supra, para.67.

8) For the meaning of this term under ULIS, see para. 46, supra.

9) For example, the fact that avoidance for the future must, according to Art.75 of ULIS, be declared promptly does not prevent the seller from only exercising it after he has given the buyer a further period of time for performance, see Bundesgerichtshof, 28 III. 1979-VIII ZR 37/78, quoted in UNIDROIT (1979) vol. 2, pp 277 f.

So far as English Law is concerned, the test depends on whether the buyer's breach constitutes a repudiation to the whole contract; whether it is so, is a question of fact to be determined in each case in the light of its own circumstances.(10) In other words, the seller is entitled to avoid the contract in respect of future deliveries if the buyer indicates by words or conduct that he intends to abandon the contract.(11)

75- 10) See s.31.2 of the SGA, supra, para.62.

11) See the cases cited in note 2, supra, in particular Freeth case, p 93; The Mersey case, p 439: "there must be an absolute refusal to perform his part of the contract". But "the true test will generally be not the subjective mental state of the defaulting party, but the objective test of the relation in fact of the default to the whole purpose of the contract", see Maple case, supra, 156.

Section V

Effects of Avoidance

76. Summary of effects

When avoidance validly takes place, it affects the contractual relationship by putting an end to it. In that case, both parties are released from their obligations either wholly or in part as the case may be. Notwithstanding that, the contract remains alive for the purpose of settling any dispute between the parties including the question of damages. Moreover, either party is bound to make restitution of whatever he has received from the other under the contract. All these questions will be dealt with in the subsequent discussion.

1. Effects on the contract

77. Texts

Art. 78.1 of ULIS provides that:-

"Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due."

While Art. 81.1 of the Convention provides that:

"Avoidance of the contract releases both parties from their obligations under it, subject to any damages which may be due. Avoidance does not affect any provision of the contract for the settlement of disputes or any other provision of

the contract governing the rights and obligations of the parties consequent upon the avoidance of the contract."(1)

78. Termination in general

Thus, the general principle as laid down in ULIS and the Convention is that avoidance releases both parties from their obligations under the contract.(1) But this statement is somewhat misleading even as a general rule. In many events, some and maybe a great part of obligations may never be affected by avoidance. Indeed, a distinction should be drawn in this respect between two different situations, that is, whether avoidance relates to the whole contract or only to part of it. In the former situation, both parties are certainly liberated, as a rule, from all their obligations arising out of the contract.(2) But in the latter, avoidance terminates only those obligations which fall under such part of the contract that has been avoided while other obligations survive.(3)

77- 1) For a legislative background of the text, see the following documents successively: A/CN.9/87, paras.138-144;A/CN.9/100, para.108; ibid, annex 1, art.51(78); A/CN.9/116, annex 1 (art.51); A/32/17, annex 1, para.462, and para.35 of the original document (art.52); A/33/17, para.28 (art.66); A/CONF.97/19, pp 136,387 f, 144, 146 (art.66) and 227, para. 32.

78- 1) A similar provision is stated in CITC (s.243.1).

2) But cf., post, para. 82.

3) Post, para. 81.

79. Total & partial avoidance

In general, one may well say that the avoidance may be total affecting the whole contract or partial relating to part of it only; whether the seller is entitled to resort to either is a question depending on the case.

In two situations, his right of avoidance is confined to total avoidance and, therefore, he cannot avoid only part of the contract. The first is where the buyer's breach is completely anticipatory;(1) the other is where the contract is not by instalments but rather is indivisible. An illustration of the latter event is the case in which payment of the whole price and delivery of the whole goods are to be made simultaneously; if, in such an event, the buyer fails to make payment, the seller who seeks avoidance cannot avoid only part of the contract while other parts remain alive; rather, he must avoid the whole contract or nothing and, again, a similar principle applies to the former situation.

Contrary to that is the case in which the contract is by instalments and the buyer violates it in respect of one or more instalments other than the first one. In this setting, the seller cannot avoid the whole contract including previous deliveries which have already been paid for; he may only resort to partial avoidance in respect of deliveries so violated and, at the most, of future deliveries as well.(2)

79- 1) See also Treitel, Law of Contract, p 642.

2) See supra, paras. 74 f.

Finally, in other situations the seller may, at his option, resort to either total or partial avoidance. An illustration of this is where the contract is by instalments and the buyer fails to make payment for the first instalment. Suppose in this setting that the requirements of avoidance with relation to that instalment and future instalments as well are met.(2a) In such an event the seller has the option to avoid the contract either totally or only in respect of the first instalment.

By contrast, the doctrine of total avoidance is in line with the general rule prevailing in French Law. According to which, avoidance operates not only prospectively but also retrospectively;(3) and it therefore affects the whole contract as though it had never been made.(4) But in "contracts successifs," eg., an instalment contract, avoidance operates prospectively.(5) In addition, a court before which the dispute is brought may, as previously stated, grant an order of partial and not total avoidance.(6)

80. English Law

Under the English general law of contract, avoidance of the contract, i.e., its "termination"(1) by the innocent party

---

79- 2a) Supra, paras. 74 f.
3) See Marty et Raynaud,para.303; Starck,para.2180; Mazeaud, t.3, vol. 2, para. 1015.
4) Planiol et Ripert, vol. 10, para.166.
5) Supra, para. 70.
6) Supra, para. 20.
80- 1) See supra, para. 14.

on the footing of the other's breach operates prospectively and not retrospectively.(2) Thus, termination is quite different from "rescission" ab initio, such as may arise for example in case of misrepresentation where the contract is treated as never having come into existence.(3)

An obvious illustration of "termination" is an instalment contract in the meaning given above.(4) Suppose, for example, that the buyer violates the contract in respect of one or more instalments; in that case, the seller may be entitled to avoid the contract in relation to future deliveries(5) but not to deliveries already made. Thus, it is clear that avoidance in such a case does not affect the whole contract but only part of it.

If, on the other hand, avoidance is based on an anticipatory breach, the acceptance of the breach must be complete . A party, as has been said, cannot accept an anticipatory breach of one term in a contract while treating the contract as still in existence for other purposes.(6)

Further, the contract may be indivisible, or, more precisely, the goods which are the subject-matter of the sale may be regarded as parts of indivisible whole, eg., parts of

---

80- 2) See Cheshire, Fifoot and Furmston, p 491; Chitty, paras.441, 1629; see further Heyman v. Darwins Ltd. [1942] A.C. 356, 399; Johnson v. Agnew [1980] A.C.367, in particular at 392-393.
3) Johnson case, ibid.
4) Supra, this Ch., s.IV.2.
5) Supra, para. 75.
6) Treitel, Law of Contract, p 642.

a machine. In such a case, it is assumed that the seller may avoid the whole contract even with respect to those instalments which have already been delivered.(7)

Finally, it has been argued that the seller is deprived of his right as against the goods (which seems to include avoidance) whenever both possession of, and property in, the goods are vested in the buyer.(8) If this conclusion is correct, the result is that the seller may be entitled to resort to partial avoidance in each case the property in, or possession of, part of the goods is still vested in him.

81. Termination of obligations

Turning again to the Convention and ULIS where the general rule in both is that "avoidance releases both parties from their obligations" under the contract.(1) If avoidance is total, it liberates the parties from all their contractual obligations whether or not they have matured. Suppose,for instance, that a contract calls for delivery by instalments and the buyer has refused to pay for the first and second instalments; the result of which is that the seller has avoided the whole contract.

In this hypothesis, neither the seller remains bound to make further deliveries nor is the buyer bound to take those

---

80- 7) Supra,para.71; it has been suggested, however, that the same principle applies where the defaulting party is the seller (Benjamin, para. 653).

8) Benjamin, para.1247; Sutton, Sales and Consumer Law 3rd ed., 1983, p 397. But cf., Chalmer, Sale of Goods, p 221 where it is considered that there is no clear authority in support of =

deliveries or to pay for them. Moreover, the latter is released from his obligations even with respect to those deliveries which have already been effected.

Similarly, if the seller, where he is entitled to do so, avoids only part of the contract, both parties are released from their obligations under that part(2) while other obligations remain alive as if there had been no avoidance. This principle applies irrespective of whether or not those obligations are mature. Suppose in the above example that the seller has avoided the contract only with respect to the second delivery. The position in such a case may be envisaged as if that instalment were not a part of the contract. As to the first instalment, the buyer and seller remain bound by its obligations such as payment by the former or the latter's duty to hand over any document relating to it. A similar principle also applies with respect to future deliveries.

Again, those principles are closer to French more than to English Law. As indicated above, the general rule under the former is that avoidance affects the whole contract as if it had never existed.(3) This clearly means that both parties are

---

80- =) this proposition.

81- 1) Supra, para. 78.

2) See A/CN.9/116, annex 2, comment on art.51, para.2; A/CONF. 97/5, comment on art.66, para.3; see also A/CN.9/100, annex 2, (a proposal by Norway to UNCITRAL draft convention) comment on art.78.

3) Supra, paras. 70, 79.

released from any obligation under the contract whether or not it falls due. But if the contract is "successif", a different rule applies; that is, avoidance operates prospectively and not retrospectively,(3) which simply means that avoidance has no impact on those obligations which have already matured.(4)

Under English Law, by contrast, the avoidance releases both parties from their primary obligations to perform in the future.(5) To this extent, therefore, all the laws relevant to the current study are in agreement. As regards other obligations already due by the time of the avoidance, the rule under English Law amounts to this: the avoidance does not affect the existing rights and obligations, and this is, as has just been seen, a main difference between "rescission" and avoidance.(6) Nevertheless, it may be that even the avoidance may, in certain circumstances, affect the existing obligations; this question mainly depends, as suggested, upon whether a particular obligation falls under such part of the contract that has been justifiably avoided; if so, then that obligation becomes at an end whether it is the duty of the innocent or the defaulting party.(7)

81- 4) However, there is a real trend in French Law to apply the principle of retroactive operation of avoidance to the "contrats successifs", see Marty et Raynaud, para.303.

5) But the defaulting party becomes under a secondary obligation to pay damages, see eg., Moschi v. Lep Air Services Ltd. [1973] A.C.331; Photo Production Ltd. v. Securicor Transport Ltd. [1980] A.C.827,848; R.V. Ward Ltd. v. Bignal [1967] 1 Q.B.534, 548, 550.

82. Survival of the contract

Although the avoidance terminates the contractual obligations to the extent discussed above, the contract survives for certain purposes in particular for assessing the seller's damages. In addition to the Convention and ULIS,[1] this principle is well-established in both English[2] and French Law.[3]

Moreover, the Convention provides for two types of contractual clauses which are not affected by avoidance. Firstly, the clauses relating to the settlement of disputes, e.g., a clause providing for the law applicable to the contract or for choice of forum, and an arbitration clause.[4] Secondly, any clause governing the rights and obligations of the parties consequent upon avoidance such as that providing for reciprocal notices, liquidated damages or restitution.

It should be noted, however, that the survival of any contractual provision does not mean the validity of such a provision.[5] As already mentioned, the validity of any

---

81- 6) Supra, para. 80; see further Beatson, 97 LQR, 1981, p 389; Treitel, ibid, pp 639 f.

7) For an example of this, see supra, paras. 71, 80.

82- 1) See the texts of both, supra, para. 78.

2) See e.g., Michael v. Hart and Co. [1902] 1 K.B. 482, 490; Moschi case, supra; Johnstone v. Milling (1886) 16 Q.B.D. 460, 467; see also Beale, pp 105-106; Benjamin, para. 1240; Cheshire, Fifoot and Furmston, p 492; Shea, 42 M.L.R. 1979, p 623, in particular pp 635, 642 ff.

3) Mazeaud, t. 3, vol. 2., para. 1016.

4) In English Law, too, avoidance does not affect an arbitration clause, see Heyman v. Darwins Ltd. [1942] A.C. 356.

5) See A/CONF.97/5, para. 5.

provision under the contract is outside the scope of the Convention(6) and subject to the law applicable to the contract.

2. Restitution

83. Texts

Art. 78.2 of ULIS provides that:-

"If one party has performed the contract either wholly or in part, he may claim the return of whatever he has supplied or paid under the contract. If both parties are required to make restitution, they shall do so concurrently."

While Art. 81.2 of the Convention provides that:

"A party who has performed the contract either wholly or in part may claim restitution from the other party of whatever the first party has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently. (1)

84. Meaning in general

The principle of restitution as provided for by the Convention and ULIS presumes that the contract has already been performed either wholly or in part, and then avoided. In that case, either party is entitled to require restitution of

---

82- 6) And ULIS as well, supra, para. 21.

83- 1) For a legislative background of the text, see the documents cited in para. 77, note 1, supra.

whatever the other has received[1] under the contract; and the party who claims restitution must also make restitution of that which he has received from the other party.[2] Suppose, for example, that the seller has obtained part of the contract price and the buyer has obtained the goods, and the former avoided the contract. In this case, the buyer and seller are bound to make restitution in respect of the goods and that part of the price respectively, and at the same time either party is entitled to require such restitution.

Moreover, this principle applies irrespective of whether performance has been made by both parties or only by one of them. But in the former situation, where it is presumed that both are bound to make restitution, they must do so "concurrently". Neither the Convention nor ULIS clarifies the meaning of this term; but it is assumed that reciprocal restitution in such a case is to be made at the same time;[3] in addition, either party is entitled to refrain from making restitution until the other fulfils his duty with respect to restitution.

It should be noted, however, that the principle of restitution only applies to such part of the contract that has been affected by avoidance. So, for instance, if a contract calls for delivery by instalments and the seller has validly avoided

---

84- 1) Cf., para. 88, post.
2) A/CN.9/116, annex 2, comment on art.51, para.8; A/CONF. 97/5, comment on art.66, para.8.
3) Which is the same, as has been seen, in case of payment and delivery (supra, para. 10).

only one instalment;(4) the restitution would be confined to that instalment. In other words, the principle has no place with relation to any part of the contract which remains alive, nor of course if the contract has never been performed at the time of avoidance.

85. Parentage

Thus, it is plain that the purpose of restitution is to put the parties into the same position they would have occupied had the contract never been performed. The doctrine as such reflects, indeed, the retrospective feature of avoidance which is more familiar to French than to English Law.(1) As was indicated, the general rule under the former is that avoidance operates retrospectively;(2) accordingly, either party is bound to restore to the other what the former has acquired under the contract.(3)

Although English Law does not carry the concept of avoidance this far,(4) it will be noted in the subsequent discussion that claiming restitution as a result of avoiding the contract may, in certain circumstances, be available to

---

84- 4) See supra, para. 74.

85- 1) Supra, paras. 79 f.

2) Supra, para. 79.

3) See Mazeaud, t.3, vol.2, para.1015; Planiol et Ripert, vol. 10, para.166; Starck, para. 2180; see also Marty et Reynaud, para. 303.

4) Honnold, Uniform Law, para.444. But when avoidance in the meaning of "rescission" is based upon misrepresentation, =

both parties including the defaulting buyer.(5)

86. Obstacles of restitution

However, the fulfilment of restitution may be encountered by various obstacles whether material or legal. An obvious illustration of the former is the situation in which the goods have been consumed or have perished.(1) An illustration of the latter is the case of the buyer who is insolvent or bankrupt,(2) or who has disposed of the subject-matter to a third party. In these circumstances or the like, it may be impossible to restore the goods already delivered(3) and the question which then arises is concerned with the legal position of the seller.

85- =) English Law approach is quite different; supra para. 80.
5) Post, paras.89 f.

86- 1) It may be worth noting that when the defaulting party is the seller, the buyer cannot, as a general rule, avoid the contract if it is impossible for him to make restitution of the goods substantially in the condition in which he received them, see Art.79.1 of ULIS and 82.1 of the Convention; see also ss.372 f of CITC.
2) See A/CN.9/116, annex 2, comment on art. 51, para.10; A/CONF.97/5, comment on art.66, para.10; Honnold, ibid, para.444; A/CN.9/87, paras. 139 f
3) Where the benefit obtained is a sum of money, which is normally the only object of the buyer's claim , it has been considered that there is never any difficulty in making restitution, see Treitel, ibid, p 289; but so far as the international sale is concerned, the question seems to be different; for example, exchange control laws or other restrictions on the transfer of funds may bar the =

Neither the Convention nor ULIS contains a provision designated for solving this problem. On the other hand, nothing in either indicates that the impossibility of specific restitution of goods deprives the seller of his right to avoid the contract,(1) or even to claim restitution upon its avoidance. But when restitution is impossible for any reason, one may well say that the only substitute for it is a reasonable remuneration(4) which may be assessed by the value of the goods at the time of avoidance.

87. Criticism

As seen above, claiming restitution by either party is concerned with what that party has supplied or paid and not with what the other party has received under the contract.This language of both ULIS and the Convention may, in a given case, lead to unsound results and it is doubtful to assume that they have deliberately been sought by the draftsmen.

Suppose, for example, that the seller has delivered the goods to a carrier for transmission to the buyer;(1) suppose also that the former has avoided the contract. In this hypothesis, the seller would be entitled to claim restitution of the goods from the buyer who might never have the chance to take actual possession of the goods or documents representing them; and irrespective of whether the risk is still to be

---

86- =) restitution of money, see A/CONF.97/5, ibid.

4) Which seems to be the same in French Law (Starck, para. 2185).

born by the seller. The same is true in respect of claiming restitution by the buyer if, for example, he paid the price by a letter of credit which had never reached the hands of the seller.

The situation becomes more complicated if either party has performed his part of the contract which has then been avoided. In that case, a reciprocal restitution is required even if neither party has received the other's performance.

It is submitted, however, that the restitution, as a general rule, is to be restricted to such performances that have actually been received by the party from whom the restitution is claimed, or, as regards the goods, to the case in which the risk of those goods has already passed to the buyer whether or not they have actually reached his hands.

88. Restitution and damages

In most cases, the restitution is concerned with the price and goods; but the language of ULIS as well as the Convention is wide enough to cover "whatever" has been paid or supplied under the contract; eg., documents, designs and drawings which may be supplied by the seller for the purpose of putting the subject-matter of the goods into

---

87- 1) The seller's obligation of delivery may, in certain events, be fulfilled by handing over the goods to a carrier for transmission to the buyer, see Arts.29 of the Convention and 19 of ULIS; see further para. 10, supra.

operation. For his part, the buyer may supply the seller with a part of the materials necessary for manufacturing the goods(1) and the restitution also covers these materials.

Again, the wording of both laws may confuse restitution with damages. For example, the contract may call upon the seller to pay such expenses for storing the goods or transmitting them. In case of avoidance, it is submitted that his claim to recover these expenses is in damages and not a restitutionary claim. In effect, there are notable differences between the two claims. For example, the buyer's foreseeability of the seller's loss(2) and the duty imposed on the latter to mitigate his damages(3) are confined to the claim for damages, and are not required when the seller claims restitution.

89. Restitution of goods

In any case, the seller is entitled to claim restitution of the goods from the buyer, which is certainly the most important, and sometimes the only, object of his claim. In addition, the buyer must account to the seller for all benefits which the former has derived from the goods or part

---

88- 1) See, by contrast, Arts. 3.1 of the Convention and 6 of ULIS.
2) See Arts. 74 of the Convention and 82 of ULIS, post, para. 92.
3) See Arts. 77 of the Convention and 88 of ULIS, post, para. 105.

of them;[1] for example, where the goods are trucks and the buyer has obtained some benefits from putting them into operation. The approach of the Convention and ULIS is in line with French Law.[2] It should be noted, however, that the buyer's liability as regards the benefits is confined to those which he has actually acquired, and does not include any other benefit even if he could easily derive it from the goods.[3]

In English Law, by contrast, it has been noted that the seller loses his right of avoidance if, following the contract of sale, the buyer has both possession of, and property in the goods.[4] But if the property is vested in the seller while possession is in the buyer, it seems that the former is not deprived of avoiding the contract nor, presumably, of resuming the possession of goods subsequent to avoidance.[5]

89- 1) See Arts.84.2 of the Convention and 81.1 of ULIS; and for a legislative background of the former, see the following documents successively:-A/CN.9/87, paras.155 f; A/CN.9/100, annex 1, art. 54(81); A/CN.9/116, annex 1, (art.54) ; A/32/17, and annex 1, paras.467 ff of the annex and para. 35 of the original document (art.55); A/33/17, para.28 (art.69.2); A/CONF.97/19, pp 137-138,388-392, 419, 146 (art.69) and p 226, paras. 10-13.

2) Mazeaud, t.3, vol.2, para.1015; see also Planiol et Ripert vol. 10, para. 166.

3) Cf., the suggestion of Austria to the effect that restitution of goods should also cover all benefits which the buyer reasonably could have derived from them; A/CN.9/125 and add.1, the comment of Austria on art.54, para.9.

90. Restitution of the price

The buyer, though he is the party in default, is also entitled to claim restitution of the price or any part of it.(1) Moreover, the seller is bound to pay interest on it from the date of payment. Here again, these provisions in both the Convention and ULIS(1a) are in conformity with French Law.(2)

The Convention does not, however, contain any provision relating to the rate of interest;(3) while it is plain from ULIS(4) that the interest is to be fixed at a rate equal to the official discount rate in the country where the seller(5) has his place of business or, if he has no place of business, his habitual residence, plus 1%.(5a)

89- 4) See supra, para. 80.
5) See further Benjamin, paras. 1244 ff.

90- 1) As to the place where the restitution of the price should be made, it has been held in W. Germany that this question is not expressly settled by ULIS and therefore has to be settled, in accordance with Art.17, in conformity with the general principles on which ULIS is based. The court concluded that the place of performance would as a rule be the seller's place of business,and the same principle would be applied as regards the return of the purchase price. See Bundesgerichtshof , 22.XI. 1980-VIII ZR 264/79, quoted in UNIDROIT (1981) vol. 1, p 296.

1a) See Arts.81.1 of ULIS and 84.1 of the Convention; a similar provision is provided for in CITC (s.371). The reason for that is,as said, to prevent the seller from being enriched as a result of his possibility to dispose of the purchase price in the meantime (Kopac, p 126).

2) See Mazeaud, t.3, vol.2, para. 1015.

The approach of English Law relating to the buyer's right to recover what he has paid under the contract is quite different. According to which a sharp distinction has been drawn between two kinds of payments.(6) Firstly, any payment made as an earnest to guarantee the buyer's performance of his obligations is forfeited to the seller upon avoiding the contract because of the buyer's breach.(7) Secondly, if what has been paid constitutes a part-payment of the price, the buyer may recover it(8) unless the contract expressly provides otherwise.(9)

90- 3) See post, para. 136.

4) Arts. 81.1 and 83,

5) Art.83 of ULIS (post, para.136) provides for the seller's right of interest (and its rate) when the buyer delays in making payment; in such a case reference is made, with relation to the rate of interest, to the seller's place of business. And Art.81 which provides for the refund of the price already paid refers to the rate as stated in Art.83; read literally, therefore, the rate which is to be considered in these circumstances is that prevailing in the country where the seller has his place of business, though the buyer's place of business should, by analogy with Art. 81, be the relevant one. Whether this result is intentionally intended is doubtful and, accordingly, it may be that the latter's place is to be considered when applying Art.83.

5a) Cf., ss.371, 428 of CITC.

6) See generally Beatson, 97 L.Q.R. 1981, pp 389, 390 f; Chitty, paras. 1971 f; Treitel, Law of Contract, p 754; see also Atiyah, p 320; OLRC Report, vol.2, p 425.

7) Howe v. Smith (1884) 27 Ch.D. 89; but cf., post, para.135.

Two further points should be observed; firstly, whether the sum paid is an earnest or a part-payment depends upon the construction of the contract(10) and where the language used in a contract is neutral, the general rule is that the law confers on the buyer the right to recover his money.(11) Secondly, even if the sum paid is an earnest, the seller must bring it into account if he seeks to recover damages from the buyer.(12)

90- 8) Mayson v. Clouet [1924] A.C. 980, 986.

9) Beatson, ibid; Treitel, ibid.

10) See Cheshire, Fifoot and Furmston, p 535; Lindgren, Time in the Performance of Contracts, 1976, p 141.

11) Dies v. British and International Mining and Finance Cpn. Ltd. [1939] 1 K.B. 724, 743.

12) See Benjamin, para. 1261; OLRC Report, ibid.

CHAPTER II:

DAMAGES

91. Introduction

The unpaid seller's claim for damages is connected with the loss he has suffered as a consequence of the buyer's breach of the contract;(1) and its purpose is to compensate the former(2) for his loss by putting him, so far as money can do so(3) into the same financial position in which he would have been, had the contract been performed.(4) Thus, damages are always assessed by money.(5)

The present chapter will deal with the questions relating to damages under two sections:- the first will be concerned with the general principles on damages while the other will consider damages in case of avoidance.

91- 1) Post, paras. 98 ff.

2) Benjamin, para. 1296; McGregor on Damages, 14th ed., para. 9; see also Carbonnier, para. 70. Cf.,the seller's claim for interest, post, para. 96.

3) British Westinghouse Electric and Manufacturing Co. Ltd., v. Underground Electric Railways Co. of London [1912] A.C. 673, 689; Wertheim v. Chicoutimi Pulp Co. [1911] A.C. 301, 307; Victoria Laundry(Windsor)v. Newman Industries Ltd. [1949] 2 K.B. 528, 539.

4) Ibid; A/CN.9/116, annex 2, comment on art.55, para. 2; A/CONF.97/5, comment on art.70, para. 3.

5) See Arts.74 of the Convention and 82 of ULIS; "damages ... consist of a sum ..."; see also Carbonnier, ibid (dommages-intérêts); McGregor, para. 1. Cf., s. 253 of CITC in which damages may, subject to certain requirements, "be compensated by the restoration of the former state". It may be interesting to recall, in this connexion, that the restoration or say the restitution in both ULIS and the Convention does not constitute a sort of damages but an effect of avoiding the contract; see supra, Ch.,I, s.V.2.

Section I

General Principles

92. Texts

Art. 74 of the Convention[1] provides that:-

"Damages for breach of contract by one party consist of a sum equal to the loss,[2] including the loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract."

92- 1) For a legislative background of the text, see the following documents successively:- A/CN.9/87, annex 3, passim; A/CN.9/87, paras.157 ff; A/CN.9/100, para.114, and annex 1, art.55(82); A/CN.9/116, annex 1, (art.55); A/32/17, annex 1, paras.473 ff and para.35 of the original document (art. 56); A/33/17, para. 28 (art.70); A/CONF.97/19, pp 131,394 (paras.19-23), 163 (art. 70) and 221 (para. 36).

2) Cf., the suggestion of Mexico to the effect that the adverb "actually" should be added to the first paragraph of this article so as to confine payment for damages to those really suffered:- A/CN.9/87, annex 2, ibid, (comment of Mexico on Arts. 82-90 of ULIS , para.3);but see the comment of Hungary on that suggestion, ibid, para. 1.

Although ULIS does not contain, as will be seen below, a comparable provision, it is important for the subsequent discussion to mention Art. 82 which reads:

"Where the contract is not avoided, damages for a breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party. Such damages shall not exceed the loss which the party in breach ought to have foreseen at the time of the conclusion of the contract, in the lights of the facts and matters which then were known or ought to have been known to him, as a possible consequence of the breach of the contract."

1. Availability of damages

"In general"

93. The Convention and ULIS

So it is plain from the above provision of the Convention, that the main principle upon which damages are based is the loss suffered by the seller as a result of the buyer's breach.(1) The amount of damages should not, however, exceed the buyer's foreseeability.(2) Both matters will be discussed later,(3) but it is of prime significance to notice that if the

---

93- 1) The general rule in CITC is quite the same (damage): s.251; Kopac in his comment on this section, p 85; but cf.,s.191 (conventional fine) and s.356 (earnest).

2) Post, paras. 100 ff.

3) Post, this Sec., (2 and 3).

contract is avoided, the loss and foreseeability are irrelevant to the extent that damages are based on the resale(4) or current price(5) formula. To illustrate, assume that the requirements of applying the latter formula are satisfied; in this case the seller is always entitled to recover as damages the difference between the contract and the current price even if he has not sustained any loss, and irrespective of whether such a loss, if any, has not met the test of foreseeability. This principle is agreed upon by ULIS as well as the Convention.

However, the general rule as laid down by the Convention (Art. 74 above) has no counterpart in ULIS; instead, it distinguishes between two events, i.e., whether the contract has been avoided or not. But this divergence between the two laws seems to be of formal nature; in fact, the same goal of the Convention has already been achieved by ULIS but in a different shape.

Setting aside the seller's loss and the foreseeability test, it may well be that any other factor is immaterial as regards the seller's claim for damages.(6) In other words, such a claim may be available to him whether or not the breach results in avoiding the contract. If so, it is likewise irrelevant that avoidance is based upon an actual or anticipatory breach. Moreover, the seller's right to claim interest does not deprive him of claiming damages for any further

---

93- 4) Post, this Ch., s.II.1.
5) Post, this Ch., s.II.2.

loss suffered by him(7). It is granted too that the degree of the buyer's breach is immaterial in this regard.

Again, both ULIS and the Convention are in agreement with respect to those principles.

94. Non-acceptance: English Law

The unpaid seller's claim for damages under English SGA is linked with the buyer's non-acceptance of the goods(1) where s.50.1 of the Act reads:

"Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance"

In this connexion , s.35 of the Act has determined the situations in which the buyer is deemed to have accepted the goods; this may occur "when he intimates to the seller that he has accepted them, or (except where section 34 ... otherwise provides)(2) when the goods have been delivered to him

---

93- 6) Except the buyer's non-liability under Arts.74 of ULIS and 79 of the Convention (post, para. 142).

7) Post, para. 96.

94- 1) See generally Atiyah, pp 322 f; Benjamin, para.1316; Chalmer, pp 227 ff; Chitty, vol.2, para.4326;Schmitthoff, Sale of Goods,pp 173 f.

2) This section reads:"1-Where the goods are delivered to the buyer, and he has not previously examined them, he is not deemed to have accepted them until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the =

and he does any act in relation to them which is inconsistent with the ownership of the seller, or after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them."

The buyer's duty to accept the goods[3] differs from taking delivery of them; he may take the goods but until he has had the opportunity to examine them, he is not deemed to have accepted them.[4]

Similarly, the contract may provide that the buyer is to examine and accept the goods in the seller's works before a certain period of tendering delivery. In the former situation, it is plain that the acceptance occurs after taking delivery while the converse is true in the latter.

Although this distinction is recognized by the SGA,[5] it has been argued that taking delivery is one of the most important aspects of the buyer's duty to accept the goods, and his failure to take delivery will very often be regarded as a rejection of goods.[5] Even so, it should be emphasized

---

94- =) contract. 2-Unless otherwise agreed, when the seller tenders delivery of the goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract".

3) See s.27 of the SGA; and cf., Benjamin, para. 672.

4) See s.34 of the SGA above (note 2).

5) Benjamin, para. 673.

that whenever the buyer fulfils his duty to accept the goods before taking delivery of them, as in the above hypothesis, the seller cannot base his action for damages on s.50 of the SGA for a subsequent refusal of taking delivery, and the significance of the distinction becomes clear. In such an event, it is possible to say that the seller's action may, according to s.62.2 of the Act, turn on the common law rules.

Apart from the buyer's duty to take delivery, it is quite plain from s.50.1 of the Act that an action for damages may not be available to the seller for the mere non-payment of the price if it is not accompanied by non-acceptance of the goods.(5a) If, however, the goods have been accepted, the seller may be entitled to an action for the price as well as for interest on the unpaid sum; both are to be sought elsewhere in this work.(6)

Moreover, it may well be that the non-acceptance, or say the rejection, of goods and the subsequent action for damages mean that the contract does not subsist any more; that is to say, that it has been avoided as a result of the buyer's breach. Indeed, no authority opposing this inference could be found particularly in the case law; contrary to that, it is easy to conclude that the relevant cases, which will be referred to in the proper places, were brought before the courts on the assumption that the contract had already been avoided.

94- 5a) CF., however, para. 96 below .

6) Post, paras. 96, 136 and 150 f .

95. French Law

According to Article 1153 of the French Civil Code, if the debtor's obligation is a sum certain, damages resulting from a delay in performance only consist of interest (at the legal rate). Nevertheless, the creditor, say the seller may be entitled to claim damages distinct from interest if firstly, the debtor, say the buyer, has caused him prejudice independant of the delay and secondly, the former has acted in bad faith,(1) i.e., he knows that his failure to pay in time will harm the creditor.(2) Setting aside the question of interest for the moment, the faith of the defaulting buyer, whether it is good or bad, appears to be immaterial when assessing the seller's damages under the other laws relevant to this study.(3)

Two further points should be added. Firstly, the buyer's obligation to pay the sale price must be expressed in money;(4) consequently, article 1153 above applies to this obligation. Secondly, it is not possible, indeed, to talk about the buyer's

---

95- 1) See also Carbonnier, para.76; Marty et Raynaud, paras.520 ff; Starck, paras.2091 ff. There is, however, a particular rule relating to the situations in which the seller is entitled to claim interest on the price (Article 1652 of C.C.); this will be considered later (post, para. 136).

2) Carbonnier, ibid.

3) It is submitted that that fact may not be affected by Art.7.1 of the Convention which refers to "the observance of good faith in international trade" when interpreting its provisions.

delay in making payment without assuming that the contract is still alive. In other words, the provision laid down by Article 1153 would not be applied where the contract has been avoided. In this case, however, the seller may recover damages(5) which are normally assessed by the difference between the contract price and, assuming that the seller would resell the goods to a third party, the resale price.(6)

96. Damages & Interest

Art. 83 of ULIS provides that:

"where the breach of contract consists in delay in payment of the price, the seller shall in any event be entitled to interest on such sum as in arrears at a rate equal to the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence, plus 1%."

While Art.78 of the Convention provides that:

"If a party fails to pay the price or any other sum that is in arrear, the other party is entitled to interest on it without prejudice to any claim for damages recoverable under article 74."(1)

95- 4) Supra, para. 5.
5) According to Article 1184 of C.C.
6) Mazeaud, t.3, vol.2, para. 1016.

96- 1) For a legislative background of the text, see the following documents successively: A/CN.9/87, annex 3, passim, and para.166 of the original document; A/CN.9/87, annex 1 (art. 83); A/CN.9/100, para.115, and annex 1, art.56(83); =

Setting aside the question of rate of interest which will be considered later,(2) the principle of interest may be compared, as far as the aggrieved seller is concerned, with damages where there are remarkable differences between them.

In the first place, the seller's claim for interest may be available only when the buyer's obligation which has been violated consists of a "liquidated" sum, and this probably underlies, as has been noted, the words "sum that is in arrears" which are used in the Convention.(3) Accordingly, it seems that interest on damages is not recognized under either the Convention(3) or ULIS. But damages may be claimed for any breach committed by the buyer where the nature of obligation so violated is completely irrelevant; and this includes, inter alia, the buyer's delay in paying any sum that is in arrear.(3a)

96- =) A/CN.9/116, annex 1 (art.58); A/32/17, annex 1, paras.392 ff,where it was decided to delete the provision dealing with interest from the new convention;A/CONF.97/19, pp 415-418 (paras.1-52), 163 (art.73 bis) and 223-226.

2) Post, para. 136.

3) Honnold, Uniform Law, para. 422; which is similar to ULIS' approach.

3a) In this respect, it has been held in W. Germany that where the breach consists in delay in the payment of the price and the rate of exchange of the currency of the seller's country, in which payment is to be made, has fluctuated as against the currency of the buyer's country, to the detriment of the former's currency, the seller is entitled not only to interest on such sum as in arrear at a rate equal to the official discount rate in his country plus 1%, =

Under English Law,[4] by contrast, the court is generally empowered to award interest even on damages.[5] On the other hand, the common law rule, which also applies to the buyer's obligation of payment of the price,[6] is that damages may not be awarded for the delay in making payment of sum of money.[7] Recently, however, it has been held[8] that this principle applies only to general but not to special damages;[9] if, therefore, the plaintiff shows that he has incurred a particular loss as a result of the defendent's delay in payment of money and the reasonable contemplation (or say foreseeability)[10] test is met, he is entitled to recover damages for that loss.[11]

96- =) as expressly laid down in Art.83 of ULIS, but also to recover the loss he has sustained through the said fluctuation in the exchange rate (Oberlandesgericht Munchen, 18.X. 1978-7 U 2762/78, quoted in UNIDROIT, 1979, vol. 1, p 344). But cf., Magnus, p 117 where he expresses doubts as to whether this is the right solution given by Art.83 of ULIS.

4) See generally Beale, pp 168 ff; Benjamin, para.1273; Chitty, paras.1744 ff; Treitel, Law of Contract, pp 745 f.

5) S.3 of The Law Reform (Miscellaneous Provisions) Act 1934.

6) Benjamin, para. 1273.

7) The London, Chatham and Dover Railway Co. v. The South Eastern Railway Co. [1893] A.C. 429; but see Trans Trust S.P.R.L. v. Danobian Trading Co. [1952] 2 Q.B.297, 306. And this perhaps reflects a historical dislike of usury, see Kercher and Noone, Remedies, 1983, p 117.

8) Wadsworth v. Lydall [1981] 1 W.L.R. 598.

9) As to the meaning of these terms, see post, para.101.

10) See post, para. 101.

In French Law, too, the unpaid seller may have the right to claim only interest or both interest and damages depending on the case.(12)

In the second place, the seller who claims interest need not in fact show that the buyer's delay has caused him any loss which is certainly an irrelevant factor here. This principle seems to be agreed upon by all the laws relevant to the current study.(13) As was indicated, this is not the case in respect of claiming damages where the loss sustained by the seller is, as a rule, an essential condition for such a claim.(14)

Moreover, it may well be that a claim for interest under both ULIS and Convention presumes that the contract is still alive and not avoided while a claim for damages may be available in either case. Since interest in English Law may be claimed, as has just been seen, on damages, this means that

---

96- 11) See further Chitty, para. 1744.

12) Supra. para. 95.

13) See Arts.83 of ULIS & 78 of the Convention; A/CN.9/116, annex 2, comment on art.58, para.2. As to French Law, see Art.1153 of C.C; Starck, para.2091. In English Law, too, it has been said that the interest is not awarded on the basis of any body's fault but on the simple commercial basis that if the money had been paid at the appropriate commercial time, the other party would have had the use of it (Chalmer, p 322).

14) Supra, para. 93; cf., post, para. 97, note, 4.

the seller may, in a given case, be awarded interest even where the contract has been avoided because of the buyer's non-acceptance of goods.

One further point under English Law calls for particular attention. According to which, the court's power to award interest is limited to situations where"any proceedings" are "tried".(5) So that, it has no power to award interest on any sum which has been paid before the commencement of proceedings or, in other words, which is not the subject of the judgment.(15) The arbitrator or umpire, however, has a statutory power, as a rule, to award interest on any sum which is subject of the reference but which is paid before the award, for such period ending not later than the date of payment as he thinks fit.(16)

2. Seller's loss

97. In general

As was indicated, the purpose of damages is to compensate the aggrieved seller for his loss by putting him in the same financial position had the buyer duly performed the contract.(1) This may be achieved only if the former is compensated for all the expenses he has incurred as well as his loss of profit. If strictly applied, this rule may in many cases

---

96- 15) See Chitty, para.1745; Treitel, ibid, p 746.
16) See Administration of Justice Act 1982, Schedule 1, Part IV (19A).

lead to awarding excessive damages and accordingly to unfair consequences. For that reason it is generally granted, despite any differences in formulation, that the assessment of damages is subject to two rules, i.e., the foreseeability test and the seller's duty to mitigate his damages; both will be considered in the subsequent discussion.

Bearing that in mind, the amount of damages may mathematically be crystallized into the following formula:- damages=(the seller's actual expenditures + his loss of profit) - (the savings he has made + the savings he could reasonably make).

In practice, however, this is not exactly the method of measuring damages(2) and it has rightly been said that the assessment of damages is not an exact science;(3) accordingly, the court or arbitral tribunal must calculate the seller's loss in a manner which is best suited to the circumstances.(4)

98. Actual loss

There is no provision in either ULIS or the Convention determining what type of loss, other than the loss of profit,

---

97- 1) Supra, para. 91.
2) See Williston on Sales, vol.2, s.24.9,p 428.
3) Koufos v. C. Czarnikow [1969] 1 A.C. 350, 425.
4) See A/CN.9/116, annex 2, comment on art. 55, para. 3; A/CONF.97/5, comment on art.70, para. 4. Thus, in English Law damages may be awarded even if the aggrieved party has suffered no loss; in that case, damages would be nominal (Beale, p 152); moreover, the mere fact that the victim =

the innocent seller is entitled to recover because of the buyer's breach.(1) A similar approach is followed by French Civil Code.(2) However, it is well-established under the English general law of contract that the aggrieved party may recover two types of expenditures.(3)

Firstly, the incidental expenses incurred by him after the breach has come to his attention, such as those wasted for reselling,(4) storing(5) or retransmitting the goods. It is to be noted that the seller may recover such expenses whether or not the contract is avoided.(6)

97- =) has not received the performance might itself be considered to amount to a loss to him; see Treitel, ibid, p 703.

98- 1) See Art.74 of the Convention (supra, para. 92); Arts. 82 (supra, para. 92) and 86 of ULIS. However, it has been held in W. Germany that damages cover both the direct and the indirect loss provided that the defaulting party ought to have foreseen it, at the time of the conclusion of the contract, as a possible consequence of the breach (Landesgericht Essen, 10. VI. 1980-45 O 237/79, quoted in UNIDROIT, 1980, vol.2, p 388).

2) Article 1149. But damages in general are subject to the test of foreseeability except in case of dol (1150); and in all cases, recovery is limited to those damages resulting immediately and directly from the breach (Article 1151).

3) See generally Beale, pp 153 ff; Treitel, Law of Contract, pp 706, 710; as regards the seller's loss in particular, see Benjamin, paras. 1295, 1342 ff.

4) Eg., the advertising costs, see R.V. Ward Ltd. v. Bignal [1967] 1 Q.B. 534, 547; see also Fridman, p 390.

5) See Harlow and Jones, Ltd. v. Panex(International),Ltd. [1967] 2 Lloyd's Rep.509,531; see also Benjamin, para.1344; =

Secondly, the reliance expenses(7) which are wasted in performing(8) or in preparation for performance(8a) of the contract. Unlike the former type, these expenses may have been wasted before or after the buyer's breach.(9) For example, the seller who does not accept the buyer's repudiation may continue to prepare for delivery and accordingly he may incur more expenditures.

But it is suggested that in most cases the seller may not be entitled to recover the reliance expenses if the contract is not avoided. In other words, the buyer may, in spite of the breach, perform his part of the contract. Since the contract price is the consideration for the seller's performance including all expenses incurred by him with regard to that performance, he cannot therefore recover such expenses in addition to the price, unless of course the buyer's delay in payment has caused him additional costs.

98- =) Fridman, ibid.

6) But see note 12, below.

7) As far as French Law is concerned, it has been noted that it does not make a distinction between loss of profit and reliance expenses,which is familiar to Common Lawyers, see Nicholas, French Law of Contract, p 221.

8) See Beale, p 154.

8a) See Kercher and Noone, p 67.

9) It has also been held that the innocent party may be allowed to recover even the expenditures wasted before the conclusion of the contract provided that they are reasonable, see Anglia Television Ltd. v. Reed [1972] 1 Q.B.60; but cf., O'neill v. Wattaker (1918)18 S.R.(N.S.W.)39: the commission payable by the seller before the contract to his=

Finally, it may well be that the seller is entitled in case of avoidance to recover his expenses whether incidental or reliance only if, by applying the resale[10] or market[11] price test as the case may be, this test does not compensate him for such expenses.[12]

99. Loss of profit

In addition to the actual loss, the seller is entitled in the Convention and ULIS to recover the profit he would have gained if the contract had properly been performed.[1] A specific reference to such profit seems to be necessary because in some legal systems the concept of loss standing alone does not include the loss of profit.[2] A similar rule is well-established in English Law[3] and in French Civil Code as well.[4]

98- =) agent is not recoverable. However, the former case was criticized on the ground that the plaintiffs had not been resorted to their pre-contract position, but had been placed in a better position than that by the award of damages, see Ogus, 35 M.L.R., 1972, p 423.

10) Post, paras. 108 ff.

11) Post, paras. 121 ff.

12) See, however, Art.86 of ULIS which provides that in case of avoidance, damages may be increased up to the amount of any loss including loss of profit. But it has been considered that the underlined words do not mean that the court has a decision in the matter; see Graveson and Cohn, p 103.

99- 1) Although CITC entitles the injured party to recover his loss of profit, there are indeed notable differences between its provisions and the provisions of both the Convention =

On the other hand, the loss of profit may generally be recovered whether or not the contract is avoided. So far as the unpaid seller is concerned, this may not be the situation in practice; and it is possible to say that in most cases he is entitled to claim his loss of profit only if the contract has been avoided. In such an event, it is possible to assume that the seller has actually lost the profits of a bargain, and he may accordingly be entitled to recover such profits.

But when the contract is not avoided, this means that the seller's claim for damages is grounded on the buyer's delay in making payment. Therefore, his only loss of profit, if any, is the proceeds of the money if put into work during that period; and this may be avoided in practice by borrowing the sum on a short loan basis. Taking into consideration, on the one hand, the seller's duty to mitigate his damages(5) by borrowing the money or otherwise and, on the other, his right to claim interest, the result is that the seller's claim for lost profits is unlikely to succeed in these circumstances.

99- =) and ULIS; see s. 254 of CITC, and the comment of Kopak thereto, p 86.

2) A/CN.9/116, annex 2, comment on art.55, para.2; A/CONF. 9/5, Comment on art. 70, para. 3.

3) See post, paras. 119 f.

4) Art. 1149; see further Carbonnier, p 234; Nicholas, French Law of Contract, p 220-221.

5) Post, paras. 105 ff.

Notwithstanding that, the provisions of both the Convention and ULIS are quite plain to the effect that the seller is allowed to recover his loss of profit even if the contract is not avoided. This question will meet further consideration when discussing damages in case of avoidance.(6)

3. The foreseeability

100. The principle and its parentage

The principle of damages as laid down by the Convention and, to the above extent,(1) ULIS as well limits the seller's recovery to losses which are foreseeable through the buyer's angle.(2) In other words, the amount of damages should not exceed what was foreseeable at the time the contract was made as a possible consequence of the buyer's breach.(2a) This requirement is in line with French Law.(3) In spite of that, a distinction has been drawn, in French Civil Code,(4) between

---

99- 6) Post, paras. 119 f.

100- 1) Supra, para. 93.

2) The test of foreseeability is also adopted by CITC; see s.254 and the comment of Kopak thereto, ibid, p 86. There was, however, a proposal to delete the foreseeability from the new convention on the ground that it was a limitation on the right of full damages, but the Working Group did not retain that proposal, see A/CN.9/100, para. 144; see also the suggestion of ICC in A/CN.9/125 and add. 1, para. 56.

2a) And this principle applies to both direct and indirect loss (supra, para. 98, note 1).

whether or not the breach is due to the dol of the contract breaker. If so, he is then liable for both the foreseeable and unforeseeable damages;[5] otherwise his liability is limited to the former damages.

Certainly, this distinction has no place in either English Law[6] or the Convention[7] while Art. 89 of ULIS reads: "In case of fraud,[8] damages shall be determined by the rules applicable in respect of contracts of sale not governed by the present Law", i.e., by the proper law of the contract according to the rules of conflict of laws.

Apart from the question of dol or fraud, it may be sound to conclude that the foreseeability test in international sale of goods has its origin in both Civil and Common Law.[9] In English Law, however, the whole question of foreseeability has recently become arguable.[10] The principles laid down in the leading case of Hadley v. Baxendale,[11] in which an express

---

100- 3) Art. 1150 of C.C.; see also Carbonnier, para. 72; Nicholas, French Law of Contract, p 223; Mazeaud, t. 2, vol. 1, para. 629; Starck, para. 2056.

4) Art. 1150.

5) This has been considered as an exception to the general rule, see Starck, paras. 2054, 2057.

6) Treitel, Remedies, s.81.

7) See, however, the comment of Norway on the draft convention where it was suggested that the convention should contain provisions regulating the effect of fraud on damages, (A/CN.9/125, add. 1, paras. 52-53).

8) The words "dol ou de fraud" have been used in the French text.

reference was made to the doctrine under French Civil Code;[12] did not in fact refer to the "foreseeability" but rather to damages which were "in the contemplation of the parties".[13] In analyzing these words, the rules of foreseeability were then declared in one English case;[14] subsequently, the adoption of the doctrine in English Law had been taken for granted.[15] But in a recent case, the doctrine has been criticised where it is suggested to recur to the original words as declared in Hadley v. Baxendale, i.e., to the term "contemplation" instead of "foreseeability".[16] Therefore, the present criterion is the "reasonable contemplation" as it may shortly be described.[17]

Whether this divergency in phraseology may lead to practical consequences is not easy to answer at present stage. Granted, however, that the whole question has in many cases been regarded as a question of fact[18] the answer would

---

100- 9) See, however, Baer, p 101; Lagergren, 1 JBL 1958, p 139.
10) See generally Treitel, Remedies, s.83.
11) (1854) 23 L.J Ex. 179.
12) Ibid, p 181.
13) See Koufos v.C. Czarnikow Ltd. [1969] 1 A.C.350,384-385.
14) Victoria Laundry (Windor) Ltd. v. Newman Industries Ltd. [1949] 2 K.B. 528, 539.
15) It was noted that the foreseeability test in English Law was assumed by all textbooks (Treitel, ibid, note 508).
16) Koufos case, ibid.
17) Cheshire, Fifoot & Furmston, p 541.
18) See, e.g., Andre et Cie, S.A. v. J.H. Vantol,Ltd. [1952] 2 Lloyd's Rep. 282, 293; Mehment Dogan Bey v. G.G. Abdeni and Co. Ltd. [1951] 2 K.B. 405, 411; see also Schmitthoff,=

certainly be negative; that is to say, that no practical benefit may result from replacing the "foreseeability" by the "contemplation".

At any rate, it is to be noted that the foreseeability test in both ULIS and the Convention is immaterial in two events. Firstly, in respect of the seller's claim for interest; secondly, whenever, and to the extent that, the seller claims, as damages, the difference between the contract price and either the resale or market price as the case may be. As was indicated, even the loss itself is irrelevant in these circumstances.(19)

101. Types and grounds of foreseeability

In the words of the Convention,(1) the amount of the unpaid seller's damages "may not exceed the loss which" the buyer "foresaw or ought to have foreseen ... in the light of facts and matters which he then knew or ought to have known ...".(2) Although the wording of ULIS is somewhat different, the substance of this provision is quite the same.(3)

100- =) Sale of Goods, p 176. And for other views, see McGregor, para. 1528A.

19) Supra, para. 93.

101- 1) Art.74, supra, para. 84.

2) For a criticism of this formula, see A/32/17, annex 1, para. 575. On the other hand, it has been noted that the above formula produces an objective criterion in assessing the damages, see A/CONF.97/19, p 394, para. 21.

3) Art.82, supra, para. 92; Art.86; see also the next note.

Thus, the foreseeability under the Convention is of two kinds: actual (Foresaw)[4] and imputed (ought to have foreseen).[5] Similarly, the grounds or sources of the facts and matters referred to in the text are of two kinds: actual (knew) and imputed (ought to have known).[6] In theory, these two divisions may be important where the buyer, for example, might have possessed actual knowledge of some facts which might lead to (actual) foreseeability, at the time he ought not to know those facts nor to foresee the result of his breach. In practice, however, doubts may be expressed as to whether there is any advantage that could be obtained from either; and it might be sufficient had the text of the Convention only referred to the imputed foreseeability and knowledge as well.

In any case, it is plain from the Convention and ULIS that the test of foreseeability may be satisfied even if the buyer has not actually foreseen the result of his breach. It is also important to note that the facts or matters leading to the foreseeability need not be given by the seller himself; indeed, they may be derived from any other source whatsoever, e.g., an economic magazine predicting the fall of prices.

101- 4) ULIS' provisions (note 1, above) do not contain this word.

5) Although this term is not defined in ULIS, it is suggested that Art.13 applies to it mutatis mutandis, see Graveson and Cohn, pp 100, 59.

6) Which is the same in English Law, see e.g., Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 K.B. 528, 539; see also Benjamin,paras. 1308 f;McGregor, paras. 195 ff.

The approach of ULIS and the Convention may be contrasted with English Law where s.50(2) of the SGA reads: "The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract." Remembering that the foreseeability test is well-known in French Law,(7) it has been considered, nevertheless, that the assessement of damages in both the SGA(8) and ULIS(9) is based on Common Law rules as declared in Hadley v. Baxendale.(10)

In brief, damages in English Law are of two types: general and special.(11) The former, since they result from the ordinary course of events, are always recoverable; the latter are recoverable only if the defaulting party has actually possessed knowledge of special circumstances, outside "the ordinary course of events" of such a kind that a breach in those special circumstances would be liable to cause more loss(12)

101- 7) Supra, para. 100.
8) Schmitthoff, Sale of Goods, p 174; see also Benjamin, para. 1306.
9) Graveson and Cohn, p 58; see also Baer, p 101. And as noted above, the substance of the relevant provisions of both ULIS and the Convention is the same.
10) (1854)23 L.J.Ex 179. But it has been noted that s.50(2) above deals only with the general damages (below); see Chalmers, p 227. As to the special damages (below), it is considered that they are impliedly accepted by the wording of s.54 of the Act, see Benjamin, para. 1309.
11) Schmitthoff, ibid, pp 175 ff.

Thus, the preceding discussion shows notable divergencies between English Law on the one hand and, on the other, both ULIS and the Convention. Under the former, the general damages are recoverable even if they are not, at least in theory, foreseeable;[13] further, the recovery of the special damages is always subject to the buyer's actual knowledge of the circumstances leading to the foreseeability of the loss. But in ULIS and the Convention, the general damages are always subject to the test of foreseeability; and the knowledge as regards the special damages may be imputed and need not be actual.

102. Whose foreseeability?

If, under the Convention, the buyer has neither foreseen nor ought to have foreseen such part of the seller's loss, he is not liable to compensate him for it. This language would suggest that the foreseeability test does not depend merely on the buyer's own judgment, but rather on the judgment of a reasonable buyer to be put in the same circumstances[1] Under

---

101- 12) Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 K.B.528, 539.

13) See, however, Victoria Laundry case, ibid, where it has been considered that the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. In Hadley case , ibid , the reference to foreseeability or, more precisely, to contemplation was only made to special damages.

ULIS too the expression "ought to have foreseen" refers to what should have been foreseen by a reasonable person in the same situation.(2) The same may be said in respect of the expression "ought to have (or to have been) known" which is used in both. Here again, it seems to be difficult to conclude that loose words of this type may in practice lead to any differences between the two laws.

Likewise, under English Law the test of foreseeability or say the "reasonable contemplation"(3) depends on the knowledge possessed by both parties or at least by the defaulting party.(4) In all cases, "the crucial question is whether... the defendant ... should, or the reasonable man in his position would, have realized that such loss was sufficiently likely to result from the breach of contract ...."(5)

103. Time of foreseeability

The test of foreseeability is to be satisfied at the time the contract was made;(1) and, as indicated above, it turns on the facts and matters which the defaulting party

---

102- 1) Cf., however, the language of Art.10 dealing with the fundamental breach, supra, para. 17; cf., also the language of s.254.2 of CITC.
2) Art.13 of ULIS; see also Graveson & Cohn, pp 100, 59.
3) See supra, para. 100.
4) Victoria Laundry case, supra, p 539.
5) Koufos case, supra, p 385.

103- 1) Cf., the foreseeability in case of fundamental breach, supra, para. 33. And for a criticism of this rule, see =

knew or ought to have known[2] also at that time.[3] This principle in the Convention and ULIS[4] is in line with both French[5] and English Law.[6] Therefore, any information or knowledge which is subsequently acquired is irrelevant to the measure of damages.[7]

104. Foreseeability of what?

In both ULIS and the Convention, the foreseeability through the buyer's angle is directed to the "loss" suffered by the seller "as a possible consequence" of the breach.[1] Whether it is so depends, as already mentioned, upon the facts and matters known or ought to have been known by the buyer at the time the contract was made[2] Thus, should the seller consider the buyer's breach would cause him exceptionally heavy losses he may, for example, make this known to the buyer; the result is that the latter becomes liable for these losses.[3] It is suggested, further, that if the buyer has

---

103- =) Beale, p 185; but see p 186, ibid.
2) Supra, para. 101.
3) Arts.82 (supra, para. 92) and 86 of ULIS; Art.74 of the Convention (supra, para. 92).
4) And CITC too (s.254.2).
5) Art.1150 of C.C.; see, however, para. 100, supra.
6) See e.g., Hadley case, supra; Koufos case, supra, p 385; see also Beale, p 185; McGregor, para. 198; see further Samek 38 Aus. L.J. 1964, p 125.
7) Graveson and Cohn, p 101.

104- 1) Arts.74 of the Convention and 82 of ULIS (supra, para. 92).
2) Supra, para. 101.

foreseen or ought to have foreseen a particular type of loss, he would be liable for it even if that loss is unusual or a reasonable man in the buyer's position would not have accepted the risk of it.(4)

In English law, as was indicated, it has been suggested to replace the "foreseeability" by the "contemplation" criterion.(5) But in practice it is doubtful to assume that English Law, by adopting the latter, differs from either ULIS or the Convention if, in particular, the question is regarded as a question of fact.(6) Even the words "loss" and "a possible consequence" used in ULIS and the Convention as well have also been used in the English case law.(7)

Bearing that in mind, the case law may thus give much guidance when applying the texts of both ULIS and the Convention. Accordingly, it may well be that it is not necessary for establishing the buyer's liability that he should actually have asked himself what loss is a possible consequence of the breach, because the parties at the time of contracting

---

104- 3) A/CN.9/116, annex 2, comment on art.55, para. 7; A/CONF. 97/5, comment on art. 70, para. 8.

4) Cf., Benjamin, para. 1309.

5) Supra, para. 92.

6) Which is the principle as declared by some English cases (supra,para. 100). See also Parsons (H.) Livestock Ltd., v. Uttley Ingham and Co. Ltd. [1978] Q.B. 791, 802 where it has been declared that it is difficult to draw a distinction between what a man "contemplates" and what he "foresees".

contemplate not the breach but the performance. It suffices that, if he had considered the question, he would have concluded that the loss was a possible consequence of the breach.(8)

Likewise, the seller need show only a foreseeability of circumstances which embrace the head or type of loss in question, and need not demonstrate a foreseeability of the quantum of loss under that head or type.(9)

Moreover, the seller need not show that the buyer ought to have foreseen the precise detail of the loss or the precise manner of its happening. It is enough if the latter should have foreseen that loss of that kind was a possible consequence of his breach.(10) And if the buyer ought to have foreseen a particular type of loss, the test is satisfied even if he has not foreseen the extent of that loss.(11)

104- 7) See e.g., Parsons Livestock Case, supra, 804. But in the leading case of Hadley v. Baxendale (1854) 23 L.J.Ex.179 reference was made to the "probable result".

8) See Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 2 K.B. 528, 539.

9) See Wroth v. Tyler [1974] Ch.30, 61 (contemplation).

10) See Christopher Hill, Ltd. v. Ashington Piggeries, Ltd. [1969] 3 All E.R. 1496, 1524.

11) See Parsons case, supra.

4. Mitigation of damages

105. Texts

Art. 88 of ULIS provides that:

"A party who relies on a breach of the contract shall adopt all reasonable measures to mitigate the loss resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages."

While Art. 77 of the Convention[1] provides that:-

"A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including the loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss would have been mitigated."

106. No difference between ULIS and Convention

The principle of mitigation of damages in international sale of goods is another restriction on the seller's full

---

105- 1) For a legislative background of the text, see the following documents successively: A/CN.9/87, paras. 189 ff, and annex 1, art.88; A/CN.9/100, annex 1, art.59(88); A/CN.9/116, annex 1, (art.59); A/32/17, annex 1, paras. 502 ff, and para. 35 of the original document (art.59); A/33/17, para. 28 (art.73); A/CONF.97/19, pp 133, 396-398,163 (art.70) and 221, para. 36.

recovery of his loss resulting from the buyer's breach.(1) Although the wording of ULIS is different from that of the Convention, it is assumed that the substance of the doctrine in both is quite the same; and one may well say that there is no difference between them.

It may be argued, for example, that the amount of reduction resulting from the seller's non-compliance with his duty to mitigate, which is stated under the Convention but not under ULIS, shows a difference between these two laws. But it is submitted that such an amount would be equal to that by which the adoption of all reasonable measures would have reduced the loss,(2) which is the same in the Convention.

Similarly, the non-reference by ULIS to the loss of profit, which is not the case in the Convention, does not mean that he is under no duty to mitigate it. In fact, the expression "loss" in both laws includes the loss of profit; and an express reference to it was necessary only because the loss standing alone did not include, in some legal systems, the loss of profit.(3)

107. Criticism

However, the principle of mitigation means, so far as the unpaid seller is concerned, that he "shall"(1) or "must"(2)

106- 1) In addition to ULIS and the Convention, the doctrine has also been adopted by CITC (s.257).
2) See Graveson & Cohn, p 103.
3) Supra, para. 99.

take reasonable steps to minimize his loss. Obviously, this leads to the conclusion that he is under a duty to mitigate though it has rightly been noticed that the doctrine of mitigation does not impose any actual obligation upon him. Certainly, he will not incur any liability if he fails to fulfil such a "duty", but his damages will be reduced up to the amount of losses he reasonably could have avoided.(3) In short, he is fully entitled to be as extravagant as he pleases but not at the expense of the buyer.(4) It is important to keep this fact in mind though the term "duty to mitigate" or the like may be used in the subsequent discussion.

On the other hand, the language used in ULIS and the Convention as well for establishing the mitigation rule appears to be inaccurate; in both the seller is to minimize his loss whenever he "relies on a breach" of contract by the buyer. For example, his claim for interest certainly relies on the buyer's breach; even so, it is doubtful to assume in such a case that he is under a duty to mitigate his loss, if any. As was indicated, even the loss itself is immaterial in claiming interest.(5) However, the relevant provision of

---

107- 1) In the language of ULIS as well as CITC.
2) In the language of the Convention.
3) See Darbishire v. Warran [1963] 1 W.L.R.1067, 1075; see also Beale, p 187; Schmitthoff, Sale of Goods, p 186; Treitel, Remedies, s. 100.
4) Darbishire case, supra.
5) Supra, para. 96.

either seems to be confined to the seller's claim for damages other than interest.(6)

108. Its parentage

The doctrine of mitigation as provided for in ULIS and the Convention is completely in line with English Law(1) while the approach of French Law is different.(2) Under this law, the doctrine seems to be treated as a part of the causation principle which simply means that there must be a causal link between the aggrieved party's loss and the other's fault.(3) Thus, whenever part of the loss is due to the former's fault, the latter may not be liable for that loss;(4) and this may be parallel to the Common Law concept .. the "contributory negligence."(5)

107- 6) It may be interesting to note that the Convention provides for "interest" and "damages" in separate sections and the doctrine of mitigation has been inserted under the latter, while all these questions in ULIS have been grouped under one section, i.e., "Supplementary Rules Concerning Damages".

108- 1) See e.g., British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London [1912] A.C. 673, 689; Darbishire v. Warran [1963] 1 W.L.R. 1067; Dunkirk Colliery Co. v. Lever (1878) 9 Ch.D.20, 25; Pilkington v. Wood [1963] Ch. 770; Roper. v. Johnson(1873) L.R.8 C.P.167.

2) See in general Treitel, Remedies, in particular ss.100,104.

3) Marty et Raynaud, para. 477; Mazeaud, t.2, vol.1, para. 560.

4) See Mazeaud, ibid, para. 594.

5) Treitel, ibid, s.100; and on this principle, see generally Kercher and Noone, pp 100 ff.

Indeed, this is not the principle of mitigation in either ULIS or the Convention where the aggrieved party is, as indicated above, under a duty to minimize his loss;(6) and an obvious rule as such appears to be missed in French Law.(7)

In short, the doctrine in both ULIS and the Convention is derived from Common Law in general though some of its aspects are known in French Law.(8)

109. Reasonable measures

To comply with his duty to mitigate, the seller must take all measures reasonable in the circumstances;(1) and at the same time he is not bound to adopt more than what is reasonable. Of course, what is reasonable in the circumstances is a question of fact;(2) in spite of that, the English case law from which the doctrine of mitigation seems to be derived may, again, give some guidance in ascertaining whether or not the seller has acted in a reasonable manner.

Accordingly, it is considered that he is not bound to take any step which a reasonable man would not ordinarily take in the

---

108- 6) Supra, para. 106.
7) Treitel, ibid, s.104.
8) For example, the actual saving which is one aspect of the mitigation principle (post, para. 111) would be relevant in determining the "loss suffered" within Article 1149 of the Civil Code, see Treitel, ibid, s.104.

109- 1) Or, in the language of CITC, "... measures necessary to prevent or at least to mitigate" the loss (s.257).
2) Payzu Ltd. v. Saunders [1919] 2 K.B. 581.

course of his business;(3) nor is he bound to hunt the globe to minimize the loss suffered by him.(4) Nor does the duty to mitigate go so far as to oblige him to embark on a complicated and difficult mitigation with a third party.(5) Nor need he take any step which may ruin his commercial reputation.(6) Nor is he under an obligation to destroy his own property to reduce the damages payable by the defaulting buyer(7)

Furthermore, the seller may not have the financial means to mitigate his loss; in such a case, he is not obliged, for the purpose of reducing damages, to do that which he cannot afford to do.(8)

110. Anticipatory repudiation

On the other hand, the buyer may repudiate the contract before the date of performing it; in that case, the seller has

---

109- 3) British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London [1912] A.C. 673,689; see also Dunkirk Colliery Co. v. Lever (1878) 9 Ch. D.20, 25; James Finlay and Co. Ltd. v. N.V. Kwik Hoo Tong Handel Maatschappij [1929] 1 K.B.400, 410.

4) E.g., by reselling the goods if this is not possible in the normal market, see Lesters Leather and Skin Co. Ltd. v. Home and Overseas Brokers Ltd. (1948)64 L.T.R. 569(seller was in default).

5) Pilkington v. Wood [1953] Ch. 770, 777.

6) James Finlay case, supra.

7) Elliot Steam Tug Co. Ltd. v. The Shipping Controller [1922] 1 K.B.127,140-141.

8) Dodd Properties (Kent) Ltd. v. Canterbury City Council =

the option either to accept or to refuse the repudiation.(1) In case of accepting it, the seller, who seeks damages, is under a duty to mitigate;(2) and the converse is also true, that is to say, that he is not bound to minimize his damages if he refuses the repudiation.(3) The key question is, however, whether the doctrine of mitigation binds the seller to accept, in certain circumstances, the buyer's anticipatory repudiation.

A negative answer has been given in at least two English cases(4) one of them is concerned with the sale of goods.(5) If strictly followed, the result of this approach is that the seller is entitled to continue the performance of his part of the contract and, consequently, he would be allowed to claim the contract price. But doubts have been expressed about the extent of applying this result to the sale of goods.(6)

109- =) [1980] 1 All E.R.928, 935; see fruther Chalmer, p 248; Schmitthoff, Sale of Goods, p 187.

110- 1) Supra, para. 65.

2) Roth & Co. v. Taysen, Townsend & Co. (1895) Com. Cas.240; Sudan Export & Import Co. (Khartoum), Ltd. v. Societe General de Compensation [1958] 1 Lloyds Rep. 310, 316.

3) Anglo-African Shipping Co. of New-York, Ins. v. J. Mortner, Ltd. [1962] 1 Lloyd's Rep.81, 94-95; White & Carter (Councils) Ltd. v. McGregor [1962] A.C. 413. But when the time of performance falls due, the seller thereupon has a duty to mitigate his loss (Benjamin, para. 1338).

4) Ibid.

5) Anglo-African case, supra.

6) See Benjamin, para. 1315.

Other domestic laws(7) directly touch the problem in respect of a specific case which is familiar in practice. The seller may, during manufacturing the goods, receive the buyer's repudiation; in such a case, the former must exercise reasonable commerical judgment for the purposes of effective realization and avoidance of loss. To these ends, he may complete the manufacture and wholly identify the goods to the contract, or cease manufacture and resell them for scrap or salvage value. Furthermore, he may proceed in any other reasonable manner. Thus, the question always depends upon the seller's own judgment which must be reasonable in the circumstances.

As to the Convention, there was a proposal to add at the end of Art. 77 "or a corresponding modification or adjustment of any other remedy."(8) But this proposal was rejected(9) on the ground that it would restrict the aggrieved party's right of requiring performance;(10) and that approach might be, as said, in line with the practice in Common Law but it was not in line with the principles underlying the (draft) convention, according to which the buyer and seller had an absolute right to require specific performance so long as they

---

110- 7) See e.g., s.2-704(2) of UCC; see also s.9.6(2) of DUSA.
8) See A/CONF.97/19, p 133 (art.73, US); see also Honnold, Uniform Law, para. 419.
9) A/CONF.97/19, p 398, para. 78.
10) See in detail the debates on art.73 of the draft convention, ibid, pp 396 ff.

had not had recourse to inconsistent remedies.(11)

In short, the obvious tendency of the draftsmen was that the aggrieved party is not bound under the Convention to accept the other's repudiation.(10) Bearing in mind that the line of the Convention concerning specific performance, mitigation, avoidance(12) and the injured party's right of option is broadly similar to that of ULIS, it may therefore be sound to assume that a similar rule is applied in the latter.

111. Effects of the doctrine

The Convention as well as ULIS provide for the effects of the mitigation rule only on the assumption that the seller has failed to comply with his duty to mitigate. In that case, the buyer is entitled to claim a reduction in the damages. The amount of reduction is, in the language of the Convention, equal to that "by which the loss should have been mitigated";(1) and a similar rule may, as seen above, be applied in

---

110- 11) Ibid, p 397, paras. 64 f (Ziegel of Canada). But it is important to note that the seller's right to require payment of the price is subject to an essential requirement which will be considered later (post,para. 139).

12) Without ignoring the doctrine of ipso facto avoidance in ULIS (supra, Ch.I, s., IV).

111- 1) A similar rule is adopted by CITC (s.257). There was, however, a proposal before the Conference to replace these words by "which could have been mitigated", but this proposal had not been supported, see A/CONF.97/19, p 396, paras. 59 f.

ULIS as well.(2) Once again, this principle is in agreement with English Law.(3)

Of course, a seller who has actually minimized any part of his loss cannot claim recovery of that part. There is no provision to that effect in either ULIS or the Convention, but this is a corollary of the doctrine. Although the duty to mitigate damages is not clearly recognized by French Law, actual saving of expenses would be relevant in determining the loss suffered by the seller.(4) In English Law, moreover, this iS so even where the steps taken by the injured party are more than reasonable.(5) The reason for that is plain, that is, the purpose of damages, as was indicated, it to compensate the seller for his loss by placing him in as good a position as if the contract had duly been performed, but not in a better position.(6) This logical reasoning may justify the application of a similar rule under both ULIS and the Convention.

On the other hand, it may well be that the seller is allowed to recover any reasonable expenses incurred by him as a result of performing his duty to mitigate. This is, however, the situation under English Law(7) in which it is also

---

111- 2) Supra, para. 106.
3) British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London [1912] A.C. 673, 689.
4) Treitel, Remedies, s.104.
5) Benjamin, para. 1313.
6) Supra, para. 91.

suggested that such expenses are recoverable even if the seller's attempt has led to greater loss.(8) The reason for that is, as said, to protect the plaintiff (say the seller) who attempts to mitigate his loss.(9) Whether this approach is to be followed in ULIS or the Convention is doubtful, however. This is due to the fact that the purpose of the doctrine is to reduce the loss and not to augment it; and, further, whenever the seller's attempts to minimize lead to converse result, namely to greater loss, it may then be sound to conclude that he has not acted in a reasonable manner.

Finally, it should be remembered that the only sanction for the seller's failure to mitigate is the reduction in damages; and this does not, of course, affect his right to require payment of the price.(10)

111- 7) Lloyd's and Scottish Finance Ltd. v. Modern Cars and Caravans (Kingstons) Ltd. [1966] 1 Q.B. 764.

8) Ibid, p 782; see also McGregor , para. 243.

9) Benjamin, para. 1314.

10) A/CONF.97/5, comment on art.73, para. 3.

Section II

Damages in Case of Avoidance

112. Introduction

After laying down the general principle of assessing damages, the Convention provides for the rules of measuring those damages where the contract has been avoided. In this case, a distinction is to be made between two events, i.e., whether the seller has actually resold the goods in conformity with the Convention or not. A similar approach has been followed by ULIS though it does not contain, as seen above,(1) a general rule on damages.

It is important to note, first of all, that the amount of damages in case of avoidance is always calculated by reference to particular rules, i.e., to the resale or current price formula as the case may be. This is at least the situation in ULIS while the language of the Convention leads, as will be seen below, to a different understanding. If, however, the seller's loss exceeds that amount, then he may be entitled to recover any further damages according to the general rule in the Convention or Art. 84 of ULIS.

Bearing that in mind, the present discussion will be concerned with two matters as follows:-

1. The resale formula.
2. The current price formula.

112- 1) Supra, para. 93.

1. The resale formula

113. Texts

Art. 85 of ULIS provides that:

"If ... the seller has resold goods in a reasonable manner, he may recover the difference between the contract price and the price ... obtained by the resale."

While Art. 75 of the Convention[1] provides that:

"If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance,... the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74."[2]

114. Parentage and requirements

These provisions have no equivalent in either the SGA or French Civil Code;[1] and it is quite clear that they have

---

113- 1) For a legislative background of the text, see the following documents successively: A/CN.9/87, paras. 177 ff, and annex 1 (art.85); A/CN.9/100,annex 1, art.58(85); A/CN.9/116, annex 1, (art.56); A/32/17, annex 1, paras. 480 ff, and para. 35 of the original document (art.57); A/33/17, para. 28 (art.71); A/CONF.97/19, pp 132 (art.71), 394 (paras. 24f), 163 (art.71) and 221 (para. 37).

2) Cf., CITC (s.377.3) which provides that "... the price in such resale shall be relevant for the assessment of damages".

certain parentage in American Law where s.2-706(1) of UCC reads as follows:

"Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner, the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach."(2)

Even so, it should be pointed out that under English Law the seller's actual resale may, in certain circumstances, affect his claim for damages.(3)

However, the application of the resale formula in ULIS and the Convention is subject to certain requirements. Firstly, there must be an actual resale of the goods already sold. So, if the seller is constantly in the market for goods of the type in question, it may be difficult or even impossible to determine which of the many contracts of sale was the substitute. In such a case the use of the resale formula may be

---

114- 1) But in French Law, the damages in case of avoidance are normally assessed by the difference between the contract price and the price which could be obtained on the assumption that the goods have been resold to a third party, see Mazeaud, t.3, vol.2, para. 1016.

2) A similar provision is adopted by DUSA, s.9.10(1).

3) Post, para. 117.

impossible(4) and, accordingly, the current price formula would be applied. But it is submitted that a seller may, even in these circumstances, avoid the application of the latter formula by reselling the goods after identifying them to the broken contract.(5) It is also assumed that the resale formula does not apply if the seller has resold only part of the goods and not all of them.

Secondly, the resale must be in a reasonable manner;(6) what is reasonable is always a question of fact dependent upon the circumstances and may thus vary from case to case. Moreover, the Convention requires that the resale must take place within a reasonable time after the avoidance.(7) This express requirement is missed in ULIS, but it is assumed that the words used in the second requirement are wide enough to cover it.

No other restriction is imposed upon the seller; thus,

114- 4) A/CONF.97/5, comment on article 72, note 3.

5) Under UCC, the resale must be "reasonably identified as referring to the broken contract": s.2-706(2); so the seller cannot wait until he has made several sales of the same type of goods and select one of those sales as complying with section 2-706(2) (see Nordstrom, s.173). A similar approach is followed by DUSA: s.9-10(4).

6) Or, in the language of CITC, the seller must have "exercised due care" in reselling the goods (s.377.3).

7) Under UCC, every aspects of the resale including the time must be commercially reasonable: s.207-6(2), which is the same under DUSA: s.2-10(3).

the resale may be made privately or by auction;(8) and the resale price may be equal or, in certain circumstances, even less than the current price.(9) Also, the seller is under no duty to notify the buyer of his intention to resell the goods.(10) Once again, the seller's conduct is restricted by the reasonableness.

115. Nature of the resale

There is no provision under the Convention from which it may be inferred that the seller is bound to resell the goods, which means that he has the choice either to resell or to keep the goods for his own use.(1) Even in case of reselling them he is not under a duty to act reasonably or to resell within a reasonable time after the avoidance. The sanction for non-complying with either of these two requirements, which have just been discussed, is simply that the seller cannot rely on the resale formula for assessing his damages.(2) In brief, the resale is the seller's right and not an obligation imposed upon him.

114- 8) Which is the same under UCC: s.207-6(2), and DUSA:s.9-10(2).
9) Post, para. 117.
10) Which is not the case under UCC when the resale is at private sale: s.2-706(3).

115- 1) A similar approach is followed under UCC, see Williston on Sales, 4th ed., vol.3, s.24.7; White and Summers, Uniform Commercial Code,2nd ed., s.7.6 (but cf., note 35, ibid). See also s.9.10(2) of DUSA "the seller may resell"; s.377.3 of CITC "If the seller proceeded to a substitute resale...".

In Common Law, by contrast, it has been considered that the resale by the seller is obviously one mode of mitigating his loss.(3) In this connexion, it has been held in New-Zealand that the seller is under a duty to seek an alternative market for the purpose of mitigating his loss.(4) Whether this approach is strictly followed in English Law is doubtful, however, and no authority could be found in the case law supporting this view.

The ULIS' approach is the same of that of the Convention except in one case which is stated in Art. 61 of the former. This Article has already been considered(5) and it suffices to remember that according to which the seller is bound to resell the goods; accordingly, the contract becomes ipso facto avoided. So the resale in such a case is mandatory and the seller has no choice in making it.

On the other hand, it should be observed that the resale under ULIS and the Convention is not a real remedy comparable to that provided for in the SGA(6) in fact, the two types of resale are completely different from all aspects. In addition, while the resale under the latter may be considered as an

---

115- 2) A similar conclusion seems to be applied under UCC (see Nordstrom, in particular, s.175). There is also an express provision in DUSA to this effect: s.9-10(6).

3) Fridman, p 401.

4) Pacific Overseas Corporation Ltd. v. Watkins Browne and Co. (N.Z) Ltd. [1954] N.Z.L.R. 459.

5) Supra, para. 48.

6) S.48; for further aspects of this section, see post, paras. 183 ff.

expression of the seller's will to avoid the contract,(7) this is not the situation in either the Convention or, without ignoring Art.61 above, ULIS. Both presume that the seller has already declared the contract avoided(8) and the resale may not in itself lead to avoidance.

116. Relation with other rules

It is to be noted, first of all, that in reselling the goods the seller is entitled to retain the whole proceeds of the resale.(1) This is simply so either because he disposes of the goods after avoiding the contract or, in one case of ULIS, because the resale itself leads to avoidance.(2)

However, if the seller has resold the goods in conformity with the requirements discussed above, then the amount of his damages is basically equal to the difference between the contract and resale price. But the language of ULIS and the Convention is somewhat vague; both refer to the aggrieved seller who "may" recover that difference, and the key question is whether the application of this formula is mandatory or permissive.

In answering this question, it may be that the court has no decision in the matter at least when the seller himself

---

115- 7) S.48.4 (resale according to a contractual power); see also R.V. Ward Ltd. v. Bignall [1967] 1 Q.B. 534 (resale according to s.48.3); see further Atiyah, pp 319 f.

8) Supra, Ch., I, s. III.

116- 1) A similar approach is followed under UCC: s.2.706(6).

2) Supra, para. 48.

bases his claim for damages on that forumula. In the Convention, too, the draftsmen's intention was clear that the seller who had in fact arranged a substitute transaction of the nature described above should not be allowed to claim damages under the current price formula where that formula would provide for a higher measure of damages.(3) And, as submitted, a similar solution may be followed in ULIS;(4) this is due to the philosophy on which damages are based; that is to say, that the purpose of damages is to put the aggrieved seller into the same financial position had the buyer performed the contract but not into a better position.(5) Therefore, whenever this purpose is achieved by the resale formula, which is presumed to have met its requirements, and not by the current price formula, reference is to be made only to the former.(6)

If this inference is correct, the result is that the application of the resale formula under ULIS is mandatory whenever its requirements are satisfied and the seller has no alternative. But the approach of the Convention seems to be different; even assuming that the seller is not entitled to resort to the current price formula, he may nevertheless avoid the application of the resale formula by resorting

---

116- 3) A/32/17, annex 1, para. 472.
4) Cf., Graveson and Cohn, p 102.
5) Supra, para. 91.
6) Which seems to be the same in UCC, see White and Summers, s.7.7. Under DUSA too the prima facie rule (s.9-18,4) does not apply where the seller has resold the goods as provided=

to the general rule as laid down by Art. 74.(7) Of course, it is much better for the seller to resort first to this formula than to the general rule at least for one reason, namely, the foreseeability test which is an essential requirement in the latter is irrelevant when applying the former;(8) and in doing so, he would not be deprived of claiming damages for any further loss suffered by him.(9)

117. Relation with current price

Thus, the resort to the current price formula under both ULIS and the Convention may not be possible if there is an actual resale as described above. Certainly, this is the situation whenever the seller resells for a price higher than the current price. But if the proceeds of the resale are, on the contrary, less than the current price, it may then be possible to assume that the seller has not acted in a reasonable manner, nor has he met his duty to mitigate the loss.(1)

116- =) in s.9.10 (s.9-18,5-b).

7) The draft text as approved by the W.G. was clear to the effect that the seller might rely on the resale formula if he did not rely on the general rule (or the current price formula); see A/CN.9/116, annex 2, article 56. But before the UNCITRAL it was generally agreed that that article was an illustration of the operation of the general rule, and as a result Art.75 in its current language came into existence; see A/32/17, annex 1, paras. 471, 481 and 482. Cf., however, A/CONF.97/5, comment on article 70, para. 2.

8) Supra, para. 93.

9) Post, para. 118.

The result is that he is entitled to recover as damages the difference between the contract price and current (but not the resale) price. This is so unless, as submitted, there are circumstances justifying the resale for a price less than the current price; for example, if the market price fell while the seller was in negotiations with the orginal purchaser for amicable settlement of their dispute.(2)

In English Law, by contrast, the calculation of damages depends, prima facie, upon the test of the market price irrespective of whether or not the seller has resold the goods after the buyer's breach.(3) In spite of that, such a resale may affect the amount of damages. In this case, a distinction has been drawn between two events. If the seller immediately resells at a price less than the market price, he can only recover the difference between the contract and market price.(4) This obviously means that the prima facie rule applies here; and, as has just been indicated, a similar principle is generally applied in both ULIS and the Convention. But if he resells at a price higher than the market price, it

---

117- 1) It has also been considered that the seller's loss in such a case must not be attributed to the buyer, see Fridman, p 395; see also Sutton, p 418.

2) See Burns Philip and Co. v. Louis Phillips and Co. (1913)13 S.R. (N.S.W.) 461.

3) So, the actual resale should not be taken, as has been pointed out, in preferance of the market price, see McGregor, para. 670.

4) See Atiyah, p 330; Benjamin, para. 1331; see also Fridman, p 395; Sutton, ibid.

is not clear whether the buyer can take advantage of this to reduce damages he would otherwise have to pay.(5)

Equally, as has been pointed out, the buyer may claim that damages should only be the difference between the contract and the resale price.(6) And although there is no authority directly touches this points, it may be that a court would hold that the seller is only entitled to the difference between the contract and resale price.(7) The reason for that is two-fold. First, that difference represents the seller's actual loss; and damages are intended to compensate him for his loss.(8) Secondly, in reselling at a price more than that prevailing in the market, the seller seems to have acted in compliance with his duty to mitigate the loss.(9) If this conclusion is correct, English Law is again in line with ULIS and the Convention as well.

118. Other damages in general

Art. 86 of ULIS provides that:

"The damages referred to in Articles 84(1) and 85(2) may

117- 5) See Atiyah, p 331.
6) Atiyah, p 330.
7) Atiyah, ibid; this is also the view of Sutton, ibid. But Cf., Baer, p 55; cf., also Benjamin, ibid.
8) Supra, para. 91.
9) But if the seller, instead of reselling the goods immediately after the breach, retained and subsequently resold them, the market price rule would be applied even if the resale price was higher than the market price; see Campbell Mostyn (Provisions)Ltd. v.Barnett Trading Co. [1954]

be increased by the amount of any reasonable expenses incurred as a result of the breach up to the amount of any loss, including loss of profit, which should have been foreseen by the party in breach, at the time of the conclusion of the contract in the light of the facts and matters which were known or ought to have been known to him, as a possible consequence of the breach of the contract."

This provision as such has no counterpart in the Convention; instead, it has directly been inserted in other relevant provisions(3) including the general rule.(4)

Thus, the seller is entitled, in addition to the difference between the contract and resale price, to recover any further damages if the requirements concerning the loss and foreseeability are satisfied, such as the expenses of storing the goods or reselling them.(5) It is clear, therefore, that there is a notable difference between the recovery of those damages and that which is made according to the resale formula. If, in the latter event, the resale price is lower than the contract price, the seller, subject to the above restrictions,(6) is always entitled to recover the difference between the two prices. He need not prove more than the existence of

---

117- =) 1 Lloyd's Rep. 65.

118- 1) Post, para. 121.
2) Supra, para. 113.
3) Arts.75 (supra, para. 113) and 76 (post,para. 121) of the Convention.
4) Art.74 of the Convention, supra, para. 92.
5) Supra, para. 98.

that difference, nor is the test of foreseeability relevant to this effect.(7) Once again, this is not the situation in relation to the recovery of any damages exceeding that difference.

Although ULIS and the Convention are generally in agreement, the former requires another condition for the recovery, which is clearly missed under the latter; that is, the additional expenses incurred by the seller must be reasonable(8) and he could not, therefore, recover any unreasonable losses. But this requirement seems to be superfluous; if the seller has actually incurred such losses, this simply means that he has not complied with his duty to mitigate which requires the adoption of reasonable steps for achieving that purpose.(9)

It should also be noted that the words "may be increased" in the above text, mean, as has justly been observed, that in the event that there are such expenses or losses as are reffered to in the text, the damages are increased. They do not mean that the court has a decision in the matter.(10)

119. Loss of profit

The question of loss of profit is one of the most

118- 6) Supra, paras. 114, 117.
7) Supra, para. 93.
8) Under UCC the so-called incidental damages are also recoverable by the seller on condition that they are reasonable, (ss.2-706(1) and 2-710). Cf., s.9-18(6) and (7) of DUSA.
9) Supra, para. 109.
10) Graveson and Cohn, p 103.

important points concerning the seller's recovery. If strictly applied, the resale formula would not, in many events,entitle him to recover any damages. This is exactly the case in which the resale price exceeds or even equals to the contract price. In other cases, the seller may only be entitled to trifling damages; this always happens when the difference between the two prices is trivial. Even assuming that the resale price is much lower than the contract price, the seller may pretend that he has lost a sale because of the buyer's breach, and as a result he may claim his lost profits irrespective of the new bargain he has made.

The "profit" is not defined by either ULIS or the Convention, but it is assumed that it means the net profit which the seller would have obtained had the contract been carried out. If put in a mathematical precision, which is not the method of measuring damages in practice,(1) the loss of profit would be equal to the difference between the contract price and the total expenses(2) the seller would have incurred had he performed his contractual obligations.(3) Thus, the more expenses he incurs, the less profit he gains and the converse is true.

It is to be noted, further, that the seller cannot combine a claim for the whole difference between the contract and resale price with a claim for the whole net profit. Otherwise, he would be put into a better financial position than if the

---

119- 1) Supra, para. 97.
2) Including the overhead costs, see A/CONF.97/5, comment on article 70, para. 5.

original purchaser had performed the contract, which is inconsistent with the principles on which damages are based. Thus, if the requirements of both claims are satisifed, the seller has the right to resort to either of them but not to both, or, more precisely, he may first claim the amount resulting from the application of the resale formula, but if his lost profits exceed that amount then he has the right to recover the difference.

Once again, neither ULIS nor the Convention provides some guidance as to when the seller is deemed to have lost profits. In practice, however, this may occur in various situations. For example, the buyer may repudiate the contract during, or prior to the commencement of, the process of manufacturing the goods; accordingly, the seller who accepts the repudiation may cease manufacture.(4) Likewise, the seller, assuming that he is a dealer, may avoid the contract before acquiring the contract goods,(5) and because of that he may never acquire them. In these two hypotheses, it is not possible to apply either

---

119- 3) The official comment on UCC, which also does not define the "profit", indicates that "the normal measure there would be list price less cost to the dealer or list price less manufacturing cost to the manufacturer"; s.2-708, Comment 2. But is is considered that if the contract has established a different price from that listed on the goods or in some catalogue, the unpaid contract price should be used in the minuend to determine the seller's lost profit (Nordstrom, s.177).

4) American Law writers call that seller a"compenents seller"; see e.g., Harris, 18 Stan. L.Rev.1965, pp 66,68 ff;Sebert, p 386; White and Summers, s.7.10.

the resale or current price formula, and the basic recovery may therefore be based on the loss of profit.(6)

Finally, even conceding that the seller has actually resold the same goods, he may nevertheless be entitled to a claim for loss of profit instead of claiming damages on the ground of the resale formula. This may occur whenever he is deemed to have lost a sale in consequence of the buyer's breach, which needs further consideration below.

120. Loss of a sale

To simplify the question, assume that (A) has sold a machine to (B) for 20 whereas the total costs of (A)'s performance are 15; assume too that (A) has avoided the contract upon (B)'s repudiation and he then resold the machine for 20. In this setting, the application of the resale formula would give no damages to (A) and this result may be fair in theory; for (A) who has lost one profit (i.e., 5) under the first sale has already recovered it under the second. But (A) may allege that the second sale is an additional and not a substitute sale; and, accordingly, he would have gained two profits (equal to 10) had (B) performed the original contract. If, however, this allegation is sound, then (A) is entitled to

---

119- 5) This is called by American Law writers a "jobber seller"; (e.g., Harris, ibid, p 72; Sebert, ibid) on condition that his decision not to acquire the goods is commercially reasonable under s.2-208(1) (see White and Summers, ibid).

6) A similar approach appears to be followed under UCC(White and Summers, ibid.).

damages equal to his loss of profit on the first sale.

In short, the seller's damages may be calculated on the ground of lost profits rather than the resale formula if the second purchaser is an additional one who would have bought from the seller anyway.(1) Whether he is so, is ultimately a matter of proof;(2) and it may be that the seller is deemed to have lost a bargain because of the buyer's breach if at least two requirements are satisfied.

Firstly, the supply of the goods by the seller exceeds the demand.(3) In that case, it is quite possible to presume that he has the ability to make profit from every buyer he could find.(4) Thus, the buyer's breach would deprive him of one profit which otherwise he would have made had the contract been performed. Conversely, if the seller does not have sufficient supply to meet the market demands, the second sale may well be considered as a substitute and not an additional

---

120- 1) See generally Atiyah, p 335; Beale,p 199; Benjamin, paras. 1320, 1335; see also Nordstrom, s.177; Sutton, p 415; White and Summers, ibid, s.7.9.; see further Hill and Sons v. Edwin Showell and Sons, Ltd. (1918)87 L.J.K.B.1106; Vic Mill Ltd. Re. [1913] 1 Ch. 465, 472-474.

2) Sebert, p 391; see also Lazenby Garages Ltd.v. Wright [1976] 1 W.L.R. 459.

3) Thompson (W.L) Ltd. v. Robinson (Gunmakers) Ltd. [1955] Ch.177; Charter v. Sullivan [1957] 2 Q.B.117; see also Atiyah, pp 328-329; White and Summers, ibid.

4) Benjamin, para. 1320; but cf.,Sebert, p 388 where it is argued that the seller should also have the ability to meet the needs of particular buyers.

one. This is so because the excess demand would certainly absorb the limited supply by the seller and it is therefore unsound to give him one profit more than he could originally acquire.

Secondly, the goods sold are fungible and not unique,(5) that is, any unit of which is the equivalent of any other unit by nature or by usage,(6) e.g., sugar, rice, cereals and standarized items such as (new)(7) cars, television sets and washing machines. And it has rightly been considered that the seller cannot make more than one profit from a unique chattel.(8)

2. Current price formula

121. Texts

Art. 84 of ULIS provides that:

"1- In case of avoidance of the contract, where there is a current price for the goods, damages shall be equal to the difference between the price fixed by the contract and the current price on the date on which the contract is avoided.

2- In calculating the amount of damages under paragraph 1 of this article, the current price to be taken into account shall be that prevailing in the market in which the transaction

---

120- 5) See Atiyah, ibid.
6) See s.1-1(1),14 of DUSA; s.1-201(17) of UCC.
7) As has been held, the second hand car is a unique item, see Lazenby case, supra, 362.
8) Atiyah, ibid.

took place or, if there is no such current price or if its application is inappropriate, the price in a market which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods

While Art. 76 of the Convention provides that:-

"1- If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

2- For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods."(1)

121- 1) For a legislative background of the text, see the following documents successively: A/CN.9/87, annex 3, passim; paras. 169 ff of the original document, and annex 1(art. 84); A/CN.9/100, para. 116, and annex 1, art.57(84); A/CN.9/116, (art.57); A/32/17, annex 1, paras. 484 ff; A/33/17, para. 28 (art.72); A/CONF.97/19, pp 132, 394-396 (paras. 26-54),415(paras. 85-87), 163(art.72) and 222 f (paras. 38-50).

And s.50.3 of the SGA provides that:

"Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept."

122. Meaning: ULIS and the Convention

Art. 12 of ULIS provides that:

"For the purposes of the present Law, the expression "current price" means a price based upon an official market quotation, or, in the absence of such a quotation, upon those factors which, according to the usage of the market, serve to determine the price."(1)

This definition has been criticized on the ground that it is complicated and misleading. Furthermore, the reference to the "official market quotation" raises the difficulty of determining the meaning of this expression.(2) Accordingly, the

---

122- 1) Cf., the definition of CITC (s.377.2):"the price prevailing at the market which..." the seller "would approach under normal circumstances in order... to resell the contracted goods".

2) A/CN.9/52, para. 98; see also A/CN.9/WG.2/WP.6, paras. 75 ff. But see Baer, note 127 and at p 102 where he says that the definition of a "current price" in ULIS avoides the artificial problems connected with the concept of "available market" in Common Law; see also Hague Conference, vol.1, p 38 where it was argued that the expression "official market =

definition was deleted from the Convention(3) which in its current texts only contains the provision stated above. Even so, it may be sound to conclude that the existence of an official or even unofficial market quotation may, under the Convention, constitute a basis for determining the current price. Under ULIS, in contrast, such unofficial quotations may fall under "those factors which, according to the usage of the market, serve to determine the price."

In spite of this presumed similarity between ULIS and the Convention, it is not possible in fact to ignore the difference between them. In determining whether there is a current price, reference should first be made, under the former, to the official market quotation; and if such a quotation exits, a court is bound to apply it even if it does not reflect the factual current price. Obviously, this is not the situation in the Convention where that question is intentionally left open, and one may therefore treat it as a question of fact. The result is that a court may in a given case avoid the application of the official market quotation, if there is one, and resort to other factors if they express the real current price, e.g., an unofficial quotation.(4)

122- =) quotation" referred to an organized market, a stock exchange while the expression "open market" referred to a situation where one could buy and sell freely (Davies of UK).

3) According to a recommendation adopted by the W.G., see A/CN.9/52, para. 97.

4) But it has been noted that the current price is that for goods of the contract description in the contract amount, see A/CONF.97/5, comment on art.72, para. 6. In this =

123. Meaning in English Law

In English Law many definitions have been given to the common law term "available market"(1) which has then been adopted by the SGA.(2) It has been held, for example, that the market means that the sellers might have sent the goods in waggons somewhere else where they could sell them,"just as they sell corn on the exchange, or cotton at liverpool that is to say, that there was a fair market where they could have found a purchaser either by themselves or through some agent at some particular place."(3) Thus, the market in this meaning signifies some place where the goods can be sold.(4) But in another case(5) it has been noted, for example, that the retail prices may differ largely from wholesale prices, and in wholesale prices there are differences at different end of the chain; in times of scarcity these differences may be very great indeed. Thus, "a market for this purpose means

---

122- =) connexion, an express reference by at least one Common Law case was made to the "same quality" of the goods sold, see Francis v. Lyon (1907)4 C.L.R.1023, 1036 (seller was in default); see also Lawson.43 Aus.L.J. 1969, p 52, 59.

123- 1) See generally Atiyah, pp 327 ff; Benjamin, paras. 1319 ff; Chalmer, pp 228 f; Chitty, vol.2, para. 4327; Schmitthoff, Sale of Goods , p 180; and for an evaluation of the concept, see OLRC Report, vol.2, pp 521 ff.

2) SS.50.3 (seller's damages) and 51.3 (buyers' damages).

3) Colliery Co. v. Lever (1878)9 Ch.D.20, 25.

4) Atiyah, p 328; Chalmer, p 228.

5) Heskell v. Continental Express Ltd. [1950] 1 All E.R.1033, 1050.

more than a particular place. It means also a particular level of trade."(5)

Another view is that the market means "the buyers and sellers, and where it is possible for a person to go into the market and buy what he wants or sell what he wants."(6) It has also been suggested that "there must be sufficient traders who are in touch with each other to evidence a market."(7) Finally, the market may mean "the situation in the particular trade in the particular area was such that the particular goods could freely be sold, and that there was a demand sufficient to absorb readily all the goods that were thrust on it, so that if a purchaser defaulted, the goods in question could readily be disposed of."(8)

Two further points have been observed. First, whether there is an available market is treated by the courts as a question of fact(9) which may be the same, as indicated above, in the Convention.(10) Secondly, the courts are likely to eschew formal limitations on the meaning of available market especially because the rule including it is a prima facie measure of damages.(11)

123- 6) The Arpad [1934] P.189, 191.

7) A.B.D. (Metals and Waste) Ltd. v. Anglo Commercial and Ore Co. Ltd. [1955] 2 Lloyd's Rep. 456, 466.

8) Thompson (W.L.) Ltd. v. Robinson (Gunmakers) Ltd. [1955] Ch. 177, 187.

9) Atiyah, p 329; Schmitthoff, ibid, p 180.

10) Supra, para. 122.

11) Benjamin, para. 1322; Chitty, vol.2, para. 4327.

124. Current price damages

It is granted that the current price formula does not apply when there is no current price for the goods sold. In that case, the court is thrown back to the general rule as laid down by Art. 74 of the Convention(1) or by s.50.2 of the SGA;(2) in ULIS too damages shall be calculated on the same basis as that provided in Art. 82.(3)

If, however, there is a current price, the seller's damages are calculated under ULIS and the Convention on two bases.

In the first place, he is entitled to recover the difference between the contract and current price. It should be remembered that the test of foreseeability is irrelevant in this respect, which is the same in case of applying the resale formula.(4) Thus, the seller may recover that difference even if the buyer has not foreseen it or any part of it.

In the second place, the seller may also recover any further damages if his loss (including the loss of profit) exceeds the relevant difference, such as the costs of storing or retransmitting the goods. Similar principles relating to the resale formula, which have already been considered, apply mutatis mutandis,(5) and it is therefore unecessary to repeat

---

124- 1) See A/CONF.97/5, comment on art.72, para. 7.
2) Benjamin, para. 1333; see also Fridman, pp 397 f.
3) See Art.87 of ULIS.
4) Supra, paras. 93, 118.
5) Supra, paras. 118-120.

the discussion.

Likewise, whether the application of the current price formula is mandatory or permissive, is subject to the same discussion already made with respect to the resale formula,(6) and what has been said there is applied here. Only one point may be added; that is, the language of ULIS is quite plain to the effect that the application of the current price formula is mandatory when its requirements are satisfied;(7) indeed, neither the seller nor the court can avoid its application. As was indicated, it is suggested that a similar principle applies to the resale formula although the language used for that purpose may produce another solution.(6)

In English Law, the seller's damages are also calculated on the basis of the difference between the contract and market price if there is an available market.(8) But this is a prima facie rule and, therefore, the courts are not bound to apply it; instead, reference is to be made to the general rule as provided for by s.50.2 of the SGA. In practice, this is the case where, for example, the strict application of the market test leads to injust results or to inaccurate assessment of damages.(9) In particular, the prima facie rule is excluded whenever its application does not compensate the seller for his loss of profit.(10)

124- 6) Supra, para. 116.

7) See Art.84, supra, para. 113 "... damages shall be equal ..."; see also A/CN.9/100, annex 3, para. 191.

8) S.50.3 of the SGA, para. 121, supra.

It must also be remembered that the current price formula is not applied if the requirements of applying the resale formula are satisfied.[11] In practice, however, the seller may easily avoid the application of the latter formula by non-reselling the goods, for example, or by defering the resale until the expiration of such unreasonable time after the avoidance, or, finally, by reselling them in an unreasonable manner. If that occurs, the resale formula is automatically excluded where it would then be replaced by the current price formula.

125. Relevant place

This question obviously demonstrates significant divergencies between ULIS and the Convention; under the former, the current price is connected with the place in which the transaction has taken place, i.e., the place of concluding the contract. As has been noted, this test is indeed difficult to apply[1] where it raises the traditional complicated question: when the contract is deemed to have been made? In addition, it may well be observed that such a place may, in

---

124- 9) Thompson (W.L.) Ltd. v. Robinson (Gunmakers) Ltd. [1955] Ch.177, 188. E.g., when the goods are sold at a fixed retail price; in such a case, there may be no difference between the contract and current price while the available market requires the existence of such a difference, see Charter v. Sullivan [1957] 2 Q.B.117.

10) See Atiyah, pp 334 f; Benjamin, para. 1320; see also Fridman, p 398.

11) Supra, para. 117.

many situations, be accidental and therefore cannot be considered as an important factor in determining the current price.

So this approach has not been followed by the Convention which provides that the place of the current price is that in which delivery "should have been made."(2) Of course, no problem arises whenever the contract determines, whether expressly or implicitly, the place of delivery; in such an event, consideration may only be given to that place.(3) Even so, this fact may lead to difficulties where, for instance, the contract provides that delivery is to be made in more than one place; the question which arises here is whether all these places should be considered for determining the current price, or the court is likely to concentrate only on one place according to some relevant factors, e.g., the quantity of the goods to be delivered in that place.

If strictly followed, the former approach necessarily leads to adopting several "current prices" for assessing damages in relation to one bargain. In addition that this

---

125- 1) See A/CN.9/100, annex 3, para. 191.

2) See also s.2-708.1 of UCC (the place for tender). But cf., s.377.2 of CITC: the price prevailing on the market which the seller would approach under normal circumstances to sell the contracted goods; cf., also s.9.18(4) of DUSA "reasonable place".

3) If, however, there is no agreement to this effect, the place where delivery should have been made is determined by Art.31 of the Convention; in such a case, consideration is to be given to that provision, see A/CN.9/116, annex 2, comment on art.57, para. 5; A/CONF.97/5, comment on art.72, para. 5.

method would complicate the matter, its application may not be possible in a given case if, for example, the subject-matter of the goods constitutes, by its very nature, parts of an integrated whole such as a large machine. Likewise, the adoption of the other approach raises the question: what factors are to be considered when applying the current price prevailing in only one place?

In fact, this problem may never arise under ULIS where the place in which "the transaction has taken place" is always one place and may never be numerous. Under the Convention, however, it may be wise to suggest that the court may, in these circumstances, be thrown back to the general rule stated in Art. 74.

On the other hand, the place in which delivery should have been made (the Convention), or in which the transaction took place (ULIS), might not have a current price for the goods sold. In such a case, the substitute in both is the place which serves as a "reasonable substitute". Obviously, this expression empowers the court to play a main role in determining which place may be regarded as a reasonable substitute; and in doing so, trade usages may be given considerable regard. But since the seller would normally be required to transport the goods to that market to obtain that price,(4) the court should make "due allowance for differences in the cost of transporting the goods"(5) to that place.

125- 4) See Nordstrom, s.175.

5) This provision seems to have been derived from s.2-723(3) of UCC.

In this connexion, another difference appears between ULIS and the Convention. Under the former, the "reasonable substitute" is also resorted to whenever the application of the current price in the original place is "inappropriate". Whether it is so, is a question of reasonableness to be determined by the court. But in the Convention, the reference to the substitute place may not be made except in the case just discussed.

126. Relevant place: English Law

The question of which market is relevant in determining the market price under English Law is not yet definitely settled. According to one view, if there is an available market in more than one place, the relevant place is prima facie the place at which the goods were to be delivered under the contract.(1) Adopting this view means that English Law is in line with the Convention but not ULIS.

Nevertheless, it has been held that "where, to the knowledge of both buyer and seller, goods are bought cif or fob for shipment to a particular market, the relevant values to be taken into consideration are the values of the goods upon that market on arrival there."(2) This clearly means that the market price in fob and cif contracts is that which prevails in the place of destination of goods.

126- 1) See Atiyah, p 332 who reached this inference from Hasell v. Bagot, Shakes and Lewis Ltd. (1911) 13 C.L.R.

2) Aryeh v. Lawrence Kostoris and Son Ltd. [1967] 1 Lloyd's Rep. 63, 71.

Moreover, it has been considered that the seller is not bound to hunt the globe for seeking a substitute purchaser if this is not possible in the normal market(3) which is presumed to be fair;(4) and it might be so where the sellers "could have found a purchaser either by themselves or through some agents at some particular place."(5)

Accordingly, it has been suggested that the test is one of reasonableness in the light of the time, expense and trouble involved.(6) Indeed, this view may also be supported by some other cases which have already been considered in the current study.(7)

127. Relevant time: ULIS

Under ULIS, the current price is to be determined at the date at which the contract becomes avoided whether by operation of law (ipso facto) or by the aggrieved seller's declaration, as the case may be.(1) The potential result of

---

126- 3) Lesters Leather and Skin Co. Ltd. v. Home and Overseas Brokers Ltd. (1948) 64 L.T.R.569 (seller was in default).
4) Colliery Co. v. Lever (1878)9 Ch.D.20, 25.
5) Ibid.
6) Benjamin, para. 1324; Chitty, vol.2, para. 4327.
7) See the cases cited in notes of para. 123, supra, in particular Thompson case (note 8), and The Arpad (note 6).

127- 1) Art.84.1, supra, para. 43; cf., s.377 of CITC where the relevant time is when the injured party "could repudiate the contract for the first time". A similar approach was followed by the draft convention as approved by UNCITRAL (art.72) but it had then been changed by the Conference (see,further, para. 128 below).

this provision is that the seller, who has the right to avoid the contract, may not resort to avoidance unless and until the market price falls down.(2) So, if the current price formula is to be applied, this would certainly increase his damages but at the buyer's expense. If, on the other hand, the market price rises, the seller may, instead of avoiding the contract, insist on performance by requiring the payment of the price.

Of course, this result will not occur in at least one situation. As was indicated,(3) the seller is entitled, as a general rule, to require payment by the defaulting buyer. But he is deprived of that right if it is in conformity with usage and reasonably possible for him to resell the goods. In that case, the contract shall be ipso facto avoided as from the time when such resale should be effected; and, in these circumstances, it is not possible to envisage that the seller can speculate on the prices.

Likewise, the other situation of ipso facto avoidance in ULIS may, to a great degree, prevent the speculation. As was pointed out,(3) the seller who has the option either to avoid the contract or to affirm it because of the buyer's fundamental breach shall inform the latter of his decision within a reasonable time, otherwise the contract shall be ipso facto avoided. Since the reasonableness is a question of fact, the court may therefore prevent the speculation by considering, in the light

---

127- 2) See further para. 128 below.
3) Supra, para. 48.

of the surrounding circumstances, that the seller's decision has been taken too late. Notwithstanding that, the speculation is likely to occur in respect of those goods of which the prices are sometimes subject to unusal fluctuations, e.g., petroleum or gold. In that case, where the prices may rise and fall sharply within a very short period of time, the seller may speculate on the market price by avoiding the contract, for example, at the same date of the buyer's breach but exactly after the fall of the price; and it may be so difficult to assume here that the seller's decision has not been taken within a reasonable time.

128. Relevant time: the Convention

Indeed, this question was one the draftsmen of the Convention had encountered. The main issue was clear: the new text should eliminate the possibility of speculation by the aggrieved party at the others' expense, which is likely to occur as a consequence of applying the ULIS' formula.(1) Many suggestions were being laid before the Working Group,(2) UNCITRAL at its 10th session(3) and the Conference;(4) and the result was the adoption of the present formula which is two-fold.(5)

128- 1) See the documents cited in the following notes.
2) See e.g., A/CN.9/87, annex 3, (comment of Mexico and Norway on Art.84 of ULIS); A/CN.9/87, paras. 170 f; A/CN.9/100, para. 116.
3) See A/32/17, annex 1, paras. 485.
4) See A/CONF.97/19, pp 132, 222.

Firstly, the current price is to be determined at the time of avoiding the contract, which is exactly the same in ULIS. To this extent, therefore, the new text does not achieve the drafter's intention and one may say that the door is still open to speculation. Moreover, it may well be that the scope within which the speculation operates under the Convention is larger than that under ULIS. This is due to the fact that the ipso facto avoidance in the latter, which limits the speculation,(6) was excluded from the former.(7)

Secondly, "if the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied."(8) This formula, which seems to be vague enough, may lead to many difficulties in practice. In particular two main questions arise here:does this provision apply to both parties or only to the aggrieved buyer? And what is the meaning of the expression "taking over" the goods? In effect, both questions are not easy to answer.

As regards the first question, however, the apparent meaning of the text may lead to the conclusion that it only applies to the buyer who avoids the contract as a result of

---

128- 5) This formula is basically based on the proposal which was presented to the First Committee by various countries,see A/CONF. 97/19, P 132, (art . 72) para. 3(ii), P 415, paras. 85 ff and P 222, paras. 38ff . See also note 10 below .

6) Supra, para. 117 .
7) Supra, para. 54 .
8) Art.76.1, supra, para. 121 .

the seller's breach; this view may be supported by the fact that "taking over" the goods is a part of the buyer's duty to take delivery;(9) and this may be the draftmen's intention. If this understanding is correct, the result is that the time of avoiding the contract is the only relevant time for determining the current price whenever the avoiding party is the seller and not the buyer.(10)

But since the provision expressly refers to the "party" claiming damages in general and not to the buyer, it is therefore possible to say that it applies to both parties.

On the other hand, the Convention does not contain a provision determining the meaning of "taking over" the goods. Therefore, this problem is to be solved according to the domestic law applicable to the contract.(11) It is granted, however, that "delivery" by the seller is other than "taking over" by the buyer. Sometimes, they take place at the same time; this is so whenever the seller delivers the goods directly to the buyer who takes them. In other situations, time of delivery may differ from that of taking the goods;

128- 9) Art.60,b of the Convention.

10) This inference may also be supported by comparing the current text with the proposal referred to above (note 5). That proposal provided that "If... the party claiming damages has avoided the contract after receiving the goods or the payment, as the case may be, the current price at the time of such receipt shall be applied ...".

11) On the assumption that the general principles on which the Convention is based do not fill this gap (Art.7.2).

this may occur, for example, when delivery is effected by handing the goods to a carrier for transmitting them to the buyer.(12) In such an event, the buyer's duty of taking the goods may only be fulfilled by removing them from the carrier.(13)

Finally, the provision of the Convention raises another problem if, for example, the seller has avoided the contract after the buyer has taken only part of the goods and not all of them. The key question is: which time is relevant for determining the current price? Is it the time of avoidance? Or the time of such taking over? Once again, it is suggested that the court in such a case may be thrown back to the general rule.

129. Relevant time: English Law

The approach of English Law concerning the time for determining the market price(1) is different from that followed by ULIS and the Convention. As was indicated, the SGA provides that the market price is to be determined "at the time or times the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of refusal to accept."(2) It should be remembered that the buyer's duty to

---

128- 12) See Art.31 of the Convention.

13) And the seller may to be interested in the buyer's prompt removal of the goods from the carrier's possession, for he may be liable to the carrier for freight and demurrage if the buyer fails to pay; see Honnold, Uniform Law, para. 343.

accept the goods differs from his duty to take them although it has been considered that the latter is one of the most important aspects of the former.(3)

Thus, the time for ascertaining the market price is the date fixed by the contract for accepting the goods;(4) and if it fixes a period within which delivery and acceptance are to be made, then the relevant time is the time of tendering the goods because they ought to have been accepted at that time.(5)

If, on the other hand, no time has been fixed for accepting the goods, the relevant time is the time of the refusal to accept them. In spite of that, it has been considered that the tendency of the courts is to ignore this rule when the seller's damages are based upon the buyer's anticipatory breach.(6) In such an event, damages have to be measured with reference to the date on which the contract ought to have been performed(7) or, in other words, on which the goods ought to

---

129- 1) See in general Atiyah, pp 333 f; Benjamin, paras. 1327-1329, 1337; see also Fridman, pp 396 f.

2) S. 50.3, supra, para. 113; as to the difficulties flowing from this provision, see OLRC Report, vol.2, pp 525 f.

3) Supra, para. 94.

4) Fridman, p 396.

5) Benjamin, para. 1327.

6) Atiyah, p 333; see also Benjamin, para. 1328.

7) Millet v. Van Heek and Co. [1921] 2 K.B.369, 376.

have been accepted by the buyer. And if the action is heard before this date, the court must make the best estimate it can of the market price on that date.(8)

129- 8) Atiyah, ibid; Fridman, ibid.

CHAPTER III:

RECOVERY OF PRICE

130. Introduction

The general rule under both ULIS and the Convention is that the unpaid seller maintains an action for the price. But the application of this rule, which is in conformity with French Law, is subject to another provision which seems to have taken into consideration the Common Law view. Furthermore, ULIS contains another exception which has no counterpart in the Convention. The questions concerning the seller's recovery of the price will be dealt with under two sections: the first will be concerned with the availability of the recovery while the other will deal with the exceptions.

Section I

Availability

131. Texts

Art. 61.1 of ULIS provides that:

"If the buyer fails to pay the price in accordance with the contract and with the present Law, the seller may require the buyer to perform his obligation."

While Art. 62 of the Convention provides that:

"The seller may require the buyer to pay the price... unless the seller has resorted to a remedy which is inconsistent with this requirement."(1)

131- 1) For a legislative background of the text, see the following documents successively: A/CN.9/87, annex 4, paras. 22 ff; A/CN.9/87, paras. 36 ff, and annex 1, art.71; A/CN.9/100, =

132. Nature and requirements

The recovery of the price is a personal remedy(1) entitling the seller to require the buyer to pay the contract price or any part of it which is not paid yet. And in doing so, the seller enforces the buyer to perform what he has undertaken under the contract. This action is therefore in the nature of "specific performance"(2) though neither ULIS nor the Convention uses this expression when giving the seller the right to require payment. The practical importance of this fact is that the exception to the "specific performance" rule, as so called in both laws, applies to the seller's action for the price.(3)

However, this action may not be available unless the time of payment has elapsed; this is so even if the buyer has already violated the contract in respect of payment. To illustrate assume that a contract calls upon the buyer to make payment during three months, say May, June and July by a confirmed letter of credit. Assume too that on the 10th of May

---

131- =) annex 1, art.43(71); A/CN.9/116, annex 1, art.43; A/32/17, annex 1, paras 366 ff, and para. 34 of the original document (art.44); A/33/17, para. 28 (art.58); A/CONF.97/19, pp 11 (art.58), 124, 371 (para. 64C), 161 (art.58) and 212 (paras. 45 f).

132- 1) Atiyah, p 322; Benjamin, para. 1331; OLRC Report, vol.2, pp 414, 415.

2) Baer, p 47; see also Nordstrom, s.178:"specific enforcement". But cf., Treitel, Remedies, s.8 where it is considered that in Common Law countries, actions for an agreed sum are not referred to as suits for specific performance;a similar view was also expressed in Document V/Prep/I, in Hague Conference,=

the buyer has opened an unconfirmed credit. In this hypothesis, the seller is not bound to accept such a credit, nor can he claim payment until the lapse of July. This means, in other words, that the buyer is allowed to cure any defect in payment as long as he is still having the time to do so.(4) Thus, it is submitted that the reference by ULIS and the Convention to the buyer's failure in making payment is to be understood to that extent.

Relying on the same principle, it is to be observed that the buyer's anticipatory breach(5) does not accelerate the time of payment. So the seller who desires to obtain the contract price must wait until the maturity of payment; otherwise, he may only have an action for damages which becomes available immediately after avoiding the contract.(6)

Moreover, the action for the price remains available to the seller until he is paid. But it is suggested that a valid tender by the buyer does not prevent the seller from claiming the price although it may have some effects on other remedies

---

132- =) vol. 2, p 37.

3) Post, para. 137. Again, it has been considered that the words "judgment for specific performance" mentioned in the text, suggest that the provision does not apply (in Common Law) to a suit in which the seller claims the price, see Farnsworth, 27 A.J.C.L. 1979, p 247, 249 f.

4) As was indicated, a similar principle is applied in case of avoidance when it is based on an additional time notice (supra, para. 41).

5) Supra, Ch.1, s.IV.1.

6) Supra, para. 66.

available to him.(7)

Finally, the seller cannot require the buyer to make payment if he has already resorted to a remedy which is inconsistent with this requirement, namely, the remedy of avoidance. This will be considered below.

Assuming always that the buyer's failure in making payment is not lawfully excused,(7a) these are the only requirements in respect of the seller's action for the price and any other factor, such as the acceptance of goods or the position of property, is immaterial. This general rule in both ULIS and the Convention is completely in line with French Law(8) while the approach of English Law, as will be seen later,(8a) is quite different.

133. Payment after passage of risk

The question concerning the passing of the risk is outside the scope of the current study, but it is necessary to consider it to the extent necessary in respect of the buyer's duty of payment. In this connexion, Art. 96 of ULIS provides that:

132- 7) E.g., he may not recover any interest or damages for expenses arising after the tender (Benjamin, para. 1282).

7a) As to the doctrine of "exemptions", see post, Ch.IV.

8) This is, in fact, an application of the general principle prevailing in French Law, that is, the creditor is entitled to claim specific performance (exécution en direct ou en nature) whenever that is possible, see Art.1134 of C.C. Starck, paras. 2034, 2041. See, however, Szakats, 15 ICLQ, 1966, p 749, 761.

8a) post, para. 140

"Where the risk has passed to the buyer, he shall pay the price notwithstanding the loss or deterioration of the goods, unless this is due to the act of the seller or of some other person for whose conduct the seller is responsible."

And Art. 66 of the Convention provides that:

"Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller."(1)

It is clear from these provisions that the buyer is bound to pay the contract price even though the goods are lost or damaged before receiving them but after the risk has passed to him. A similar approach is followed by English Law as well.(2) An obvious illustration of this is the case in which the risk passes to the buyer after delivering the goods to a carrier for transmission to the buyer, which is familiar in the

---

133- 1) For a legislative background of the text, see the following documents successively: A/CN.9/87, paras. 207-212; and annex 1 (art.96); A/CN.9/100, annex 1, art.66(96); A/CN.9/116, annex 1, art.64; A/32/17, annex 1, paras. 523-533, and para. 35 (art.64) of the original document; A/33/17, para. 28 (art.78); A/CONF.97/19, pp 126 (art. 78), 162 (art.78) and 212 (para. 55).

2) A/CN.9/87, annex 2, comment of Guest (UK) on Arts. 61-64 of ULIS, appendix A; see also Atiyah, p 202. It has also been noted that most if not all legal systems are rather unanimous in leading to the same result and thus that article might be quite unnecessary, see A/CN.9/87, annex 3, (comment of Hungary, para. 6); see also s.380.3 of CITC; UCC: s.2-709(1)a; DUSA: s.9.11(1)-a.

international sale.(3) In such a case, the buyer is obliged to pay the price despite the fact that the goods have lost or deteriorated in transit.

Of course, neither Art. 71 of ULIS nor Art. 58.3 of the Convention applies to the extent that its application is inconsistent with the foregoing provisions. Both articles entitle the buyer not to pay the price until he has had an opportunity to examine the goods. So, for instance, if the goods have been lost in transit after the risk has passed, the buyer is nevertheless bound to pay the price even if no opportunity has been given to him for examining the goods.

However, the second part of Art. 96 of ULIS and of Art. 66 of the Convention may lead to confusion. In both the buyer is to pay the price unless the loss or damage (or deterioration) is due to the act (or omission) of the seller. If strictly construed, these words mean that the buyer is absolutely released from his obligation to pay the price even if, for example, the damage to the goods is so trivial that it may easily be covered by reducing the price or by damages. Whether this is the strict intention of the draftsmen is doubtful, however.(4)

133- 3) See e.g., ULIS, Arts. 97.1 and 19.2 successively; Art. 67.1 of the Convention. In fob, cif and c & f contracts (Incoterms), the buyer bears the risk of the goods from the time when they shall have effectively passed the ship's rail at the port of shipment.

4) For that reason, there was a proposal to delete that provision from the new convention. But it was argued that the exception was of great importance since, even though the =

On the other hand, the provision of ULIS differs from that of the Convention. Under the former, the buyer may also be discharged from his obligation to make payment when the loss or deterioration of the goods is due to the act of "some other person for whose conduct the seller is responsible." There is no similar provision in the Convention;(5) accordingly, this question is subject to the domestic law applicable to the contract which would also be applied in respect of ULIS for determining the persons for whose conduct the seller is responsible.(6)

134. Contrast with other remedies

It is of prime significance to note that the seller's right to require payment is inconsistent with the remedy of avoidance, and it is not possible to resort to both at the same

---

133- =) risk had passed, the seller could still interfere with the goods in such a manner as to cause loss. The second part of the article made it clear that the buyer would not have to pay the price to the extent that the loss or damage to the goods had been caused by such an act of the seller, see A/32/17, annex 1, para. 528.

5) But it should be observed that it was noted, while discussing the relevant provision, that that principle was operative without express provision throughout the Uniform Law; so, stating it in isolated instances would cast doubt on the general principle; see A/CN.9/87, para. 211. And that was, perhaps, the reason for deleting the principle from the new convention. Cf., however, the text proposed by Norway, in A/CN.9/100, annex 2, art.12.

6) On the assumption that the whole question is outside the scope of both ULIS and the Convention; see, however, =

time. If, however, the seller has avoided the contract, he cannot subsequently demand payment.(1) The reason for that is obvious, that is, the avoidance generally puts an end to the contract and once it operates, both parties are released from their obligations under the contract. This principle and its extent have already been discussed in detail,(2) and it suffices to remember that the seller may, in instalment contracts, be entitled to avoid only part of the contract while other parts survive. In that case, the buyer remains bound by his obligations under any part which has not been affected by avoidance.(3)

Thus, it seems that there is no need for ULIS or the Convention to have a particular provision stating that the seller cannot require payment if he has already resorted to any remedy which is inconsistent with that requirement; and this is in fact the situation in ULIS while the Convention expressly contains such a provision.(4) It is doubtful, however, whether there is any remedy which is inconsistent with demanding payment other other than the avoidance.(5)

133- =) Graveson and Cohn, p 107.

134- 1) A similar rule is followed under the English general law of contract, see Cheshire, Fifoot and Furmston, p 492; Treitel, Law of Contract, p 641; as to an example from the case law, see Johnson v. Agnew [1980] A.C. 367, 392.

2) Supra, Ch., I, s.V.1.

3) Supra, paras. 78, 81 f.

4) Art.62, supra, para. 131.

5) That was also the opinion of Camara (of Spain) at the Conference, see A/CONF.97/19, p 212, para. 46. Also, in an =

In the Convention, on the other hand, the seller does not lose his right to declare the contract avoided so long as he is still unpaid;(6) which means that he can do so even if he has affirmed the contract by requiring payment or otherwise. This is not the situation in at least one case in ULIS. As was indicated, the seller, who bases avoidance on the additional time notice, must avoid the contract "promptly" otherwise the contract is regarded as being affirmed and, as submitted, he cannot retract the affirmation.(7)

Unlike avoidance, however, there is no contradiction between the seller's action for damages and his action for the price. Therefore, he can under ULIS and the Convention bring the two actions together if their requirements are satisfied;(8) besides, he may be entitled to claim interest on the unpaid sum. In English Law, by contrast, the seller may have the right to claim interest for the delay in making payment while his claim for damages in these circumstances is not well-founded yet.(9)

Finally, it is granted that the rules on damages dealing with the loss, foreseeability and mitigation do not apply to

---

134- =) earlier stage of drafting the relevant text there was an express reference that the inconsistent remedy was the avoidance, see A/CN.9/100, annex 1, art.43(71).3.

6) Supra, para. 46; cf., supra, para. 66.

7) Supra, para. 46.

8) Supra, para. 96; see also Art.61.2 of the Convention: "the seller is not deprived of any right he may have to claim damages by exercising his right to other remedies".

9) Supra, para. 96.

the seller's action for the price where all these matters are irrelevant.(10)

135. No period of grace

Art. 64 of ULIS provides that:

"In no case shall the buyer be entitled to apply to a court or arbitral tribunal to grant him a period of grace for the payment of the price."

While Art. 61.3 of the Convention provides that:

"No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract."

Obviously, this rule in both laws differs from that which prevails in French Law. According to which the general rule is that the court may, after considering the economic situation of the debtor, grant for the payment a period (or periods) of grace up to one year.(1) As was indicated, a period of grace may also be granted when the creditor demands the avoidance of the contract.(2)

The approach of English Law seems to be different according to whether the seller seeks performance or avoidance. In the former situation, it appears that there is no authority

---

134- 10) Which appears to be the same under English Law (Benjamin, para. 1273).

135- 1) Art.1244 of C.C.; see also Mazeaud, t.2, v.1, paras. 909 ff; Starck, para. 1846.

2) Supra, para. 37.

in the case Law supporting the idea of giving the buyer a period of grace by the court. But in the latter, equity may interfere by giving relief against the strictness of the common law in case of forfeiture of the deposit for non-payment of a fixed sum on a day certain.(3) This principle, as has been suggested, also applies to the buyer who fails to pay the purchase price and equity may thus extend the time for payment(4) (period of grace). The precise length of the time so extended is a matter of discretion and it may be extended again on subsequent application. This is subject to an essential condition, that is, the balance of the price, if not available to the buyer, shall be paid within the time specified by the court.(5)

In any case, the whole idea of granting the buyer a period of grace for payment is expressly rejected by ULIS(6) as well as the Convention.(7)

135- 3) Re Dixon, Heynes v. Dixon [1900] 2 Ch.561, 576.

4) Atiyah, pp 320 f; as regards the forfeiture of the deposit, see supra, para. 90.

5) Barton Thompson and Co. Ltd. v. Stapling Machines Co. [1966] Ch.499, 510.

6) It was noted that the above rule in ULIS did not appear under other obligations of the buyer; and because of that omission it might be argued that ULIS did not prohibit applications for periods of grace with respect to those obligations although that result might be inconsistent with the intent of the draftsmen, see A/CN.9/87, annex 4, para. 39.

7) When the seller is in default, a similar rule is applied in both ULIS (Art.24.3, delivery) and the Convention (Art.45:=

136. Rate of interest

In addition to the unpaid price, the seller is entitled to claim interest on it. Some questions relating to this matter have already been demonstrated in an earlier chapter of the current study(1) and it may suffice here to refer to the rate of interest. Under ULIS, that rate shall be equal to the official discount rate in the country where the seller has his palce of business or, if he has no place of business, his habitual residence, plus 1%.(2) In the Convention, the provision entitling interest does not include its rate or the basic principle for its calculation;(3) therefore, it has been suggested that this question would be subject to the domestic law applicable to the contract.(4) But this view raises an important question: What is the solution if that law does not allow, for any reason,(5) the payment of interest? The same question arises in respect of ULIS when, for example, the country where the seller has his place of business also forbids interest.

135- =) general rule).

136- 1) Supra, paras. 95 f.

2) Art.83, supra, para. 96. It has been noted, in this respect, that according to some W. German cases the seller must, as a rule, prove the official discount rate. Nevertheless, the court itself can infer it from other sources such as the monthly reports of the German Federal Bank. In one case, however, a German Court allowed only one percent interest on the ground that the seller could not prove the official discount rate in his country (Magnus, p 117).

3) Art.78, supra, para. 96; see also Honnold, Uniform Law, =

In answering this question, one main fact should be kept in mind; that is, nothing precludes the seller from claiming interest when its requirements are satisfied; this is so even where the domestic law, on the assumption that it applies, forbids interest(6) and even if the seller has the right to claim damages.(7) Accordingly, it is submitted that the law applicable to the rate of interest is to be replaced by another one recognizing interest if the former is not so. This is of course the task of the court, and its choice would presumably be based on grounds reasonable in the circumstances.

In English Law, the court has a discretion to award interest on any debt claimed at such rate as it thinks fit on the whole or any part of the debt, and to decide whether interest is to be allowed for the whole or any part of the period between the date when the cause of action arises and the date of judgment.(8) These provisions apply to the seller's action for the price which is certainly an action for a debt.(9) But it should be noted that when the contract enables the seller to claim interest, the court has no

---

136- =) paras. 420 f.

4) See Feltham, 1981 J.B.L. p 359;see also Perrot, p 582. But cf., Honnold, ibid, para. 421.

5) E.g., religious reasons, see A/CONF.97/19, p 416, para. 10 (Shafik of Egypt).

6) The Conference therefore rejected a proposal that the question to be remitted to applicable domestic law, see Honnold, ibid.

7) Supra, para. 88.

8) S.3 of the Law Reform (Miscellaneous Provisions) Act 1934; cf., supra, para. 96.

discretion in the matter.(10) It has also been suggested that a similar principle applies when a trade custom or a course of dealing between the parties gives the seller such a right.(11)

The approach of French Law is completely different from that of English Law.

In the first place, the buyer is bound to pay interest in three cases:-(12) firstly, if the contract so provides; in that case the contract itself determines the rate of interest and the date on which it starts to run.(13) Secondly, if the thing sold and delivered produces fruits or other civil or natural revenues; interest starts to run here from the date of delivery.(14) Thirdly, if the buyer has been summoned; in this case interest starts to run from the date of the summons or of the seller's claim for the price in justice.(15)

In the second place, the rate of interest, if there is no agreement to the contrary, is fixed by the law itself; in the civil matters it is 4% while it is 5% in the commercial matters.(16)

136- 9) Benjamin, paras. 1273, 1276; see also Schmitthoff, Sale of Goods, p 194.

10) Benjamin, para. 1277.

11) Benjamin, ibid, note 54; see also Schmittoff, ibid , p 195.

12) Art.1652 of C.C.

13) Planiol et Ripert, vol.10, para. 147.

It should be added that, unlike English Law, the French court has no discretion in the matter of interest.

136- 14) Mazeaud, t.3, vol. 2, para. 1003.

15) Planiol et Ripert, ibid.

16) Mazeaud, ibid; Planiol et Ripert, ibid.

Section II

Exceptions

137. Texts

Art. 61.2 of ULIS provides that:

"The seller shall not be entitled to require payment of the price by the buyer if it is in conformity with usage and reasonably possible for the seller to resell the goods. In that case the contract shall be ipso facto avoided as from the time when such resale should be effected."

And Art. VII.1 of the Convention relating to ULIS provides that:

"Where under the provisions of the Uniform Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in the cases in which it would do so under its law in respect of sale not governed by the Uniform Law."

And Art. 16 of ULIS provides that:

"Where under the provisions of the present Law one party to a contract of sale is entitled to require performance of any obligation by the other party, a court shall not be bound to enter or enforce a judgment providing for specific performance except in accordance with the provisions of Article VII of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the International Sale of Goods."

While Art.28 of the Convention provides that:-

"If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own Law in respect of similar contracts of sale not governed by this Convention."(1)

138. The resale: ULIS

The first exception under ULIS is that the seller is not allowed to require payment if it is in conformity with usages and reasonably possible for him to resell the goods. This provision has already been discussed in an earlier stage of the current study,(1) and it is sufficient to remember the following points:-

1- It may be that "usages" and "reasonably possible to resell" refer in practice to those circumstances where the seller remains in possession of the goods; otherwise, usage are fairly uncommon.(2)

---

137. 1) For a legislative background of the text, see the following documents successively: A/CN.9/52, paras. 124 f;A/CN. 9/87,annex 1,(art.16); A/CN.9/100, paras. 52 f, and annex 1, art.12(16); A/CN.9/116, annex 1, art.12; A/32/17, annex 1, paras. 135 f, and para. 35 of the original document, (art. 12); A/33/17, para. 28 (art.26); A/CONF.97/19, pp 7 (art.26), 100, 304-305 (paras. 41-52), 157 (art. 26) and 206 (para. 21).

138- 1) Supra, Ch., I, s.III.1.

2) Baer, p 105.

2- Inserting usages in the texts is superfluous because they always prevail over the Law in accordance with Art. 9.(3)

3- The reasonableness is always a question of fact.

It may also be important to remember that the relevant text which was liable to various criticisms had been eliminated from the Convention.(4)

139. Concession to domestic laws

As was indicated, the general rule in both ULIS and the Convention is that the seller is entitled to require payment of the price; accordingly, a court is bound to enter a judgment enforcing such payment by the buyer. This approach concerning specific performance is in conformity with French Law;(1) in other legal systems, e.g., Common Law, specific performance is surrounded by various restrictions and regarded as an exceptional, discretionary remedy.(2) Therefore, those systems could not be expected to alter fundamental principles of their judicial procedure in order to bring ULIS or the

---

138- 3) A/CN.9/87, para. 45.
4) Supra, para. 54.

139. 1) Supra, para. 132.
2) Treitel, Remedies, s.10; see also Feltham (of the UK at the Conference),in A/CONF.97/19, p 304 particularly para. 44; Graveson and Cohn, p 61; Lansing, 18 A.Bus. L.J; 1980, p 269, 274; Szakats, 15 ICLQ 1966, p 749, 769.

Convention into force.(3) For that reason, both provide that the court before which the dispute is brought is not bound to enter a judgment for specific performance except if it would do so under its (own) law in respect of contracts of sale not governed by ULIS or the Convention. This exception is of general character and therefore applies to any performance(4) whether is demanded by the buyer or by the seller.(5)

However, the phrase "its (own) law" is capable of double interpretation.(6) It may, on the one hand, point to the law of forum or, on the other, to the proper law of the contract. The difference between them may be illustrated by the following example. Assume that the dispute has been brought before an English court, and French Law is the law applicable to the contract. Assume too that, in the light of the facts and circumstances of the case, enforcing payment is not allowed under English Law. In this hypothesis, the solution differs

---

139- 3) A/CN.9/116, annex 1, comment on art.12, para. 3; A/CONF. 97/5, comment on art.26, para. 3.

4) Cf., the draft art.71 concerning the seller's remedies as approved by the W.G. in its 5th session, in A/CN.9/87, annex 1; see also A/CN.9/100, annex 1, art.43(71) as approved by the W.G.at its 6th session.In both, the seller's claim for the price was available without any exceptions.

5) Cf., Goldenhielm, 10 Scan. Stud. in Law 1966, p 10,17 where it is considered that in spite of its general character, Art.16 of ULIS appears to refer only to the performance by the seller; cf., also supra, para. 132, notes 2 and 3.

6) See Honnold, Uniform Law, para. 195.

according to whether English Law (law of forum) or French Law (proper law) would be applied. Of course, this problem may not arise if, for example, both laws allow or, on the contrary, do not allow enforcing payment in respect of the relevant dispute.

Indeed, the adoption of either is not free from difficulties in practice. To illustrate, suppose in the above example that English Law would be applied whether it is the proper law or the law of forum; suppose too that enforcing payment is not permitted in accordance with that law. In such an event, therefore, damages are the only remedy available to the seller; and this means that the contract does not exist any more, i.e., it has been avoided(7) although the rule in both ULIS and the Convention is that avoidance may not occur unless and until it is declared by the injured party.(8) And, as clear, there is no declaration of avoidance in this hypothesis.

It is granted, however, that the application of the domestic law should not go beyond whether or not it enforces payment; and if not, where damages are the substitute, then those damages must be calculated according to ULIS or the Convention and not to the domestic law.

Moreover, it has been indicated that the seller may not, in one case in ULIS, resort to avoidance; he may only have the right to an action for the price plus interest.(9) In such a

---

139- 7) Supra, para. 94.
8) Without ignoring the ipso facto avoidance in ULIS; supra, Ch.I, s.III.1.

case, another thorny difficulty arises if, according to the domestic law, the seller cannot claim payment but damages. In these circumstances, it is clear that the seller would be put in a critical position in particular when remembering that the seller's loss, his duty to mitigate and the foreseeability test are relevant to his action for damages but not for the price.(10)

It is indeed difficult to envisage academic solutions to the foregoing difficulties; but it is suggested that the language of both ULIS and the Convention refers to the proper law of the contract and not to the law of forum.(11) This is so because the court, when the contract is not governed by ULIS or the Convention, would (normally) apply the law applicable under rules of conflict of laws.

140. Illustration: English Law

S.49.1,2 of the SGA reads:-

"1- Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

2- Where, under a contract of sale, the price is payable

139- 9) Supra, paras. 52,57.
10) Supra, para. 134.
11) That was also the opinion of Krispis (of Reece) at the Conference; see A/CONF.97/19, p 305, para. 46; but cf., Honnold, Uniform Law, para. 195.

on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been apportioned to the contract."(1)

Under this section, the seller is expressly entitled to an action for the price in two situations.

The first situation is where the property has passed to the buyer irrespective of whether or not the goods have been delivered to him. The failure to transfer the property may be due to the wrongful act of the buyer; even in this event, the seller is not allowed to claim the price.(2) If fob contracts, for example, it is customary to consider that property passes when the goods are shipped on the vessel nominated by the buyer.(3) Thus, if the latter refuses to name the vessel, the seller may claim damages but not the price.(4) A similar principle applies to cif contracts where the buyer refuses to take the shipping documents, delivery of which transfers the property to him.(5)

140- 1) Cf., s.2-709(1) of UCC; s.9.11(1) of DUSA. And for an evaluation of the text, see OLRC Report,vol.2 pp 415 ff.

2) Atiyah, p 323; Benjamin, para. 1288.

3) Federspiel and Co. S.A. v. Charles Twigg and Co. Ltd. [1957] 1 Lloyd's Rep. 240, 247, 248. But it is suggested that it is more accurate to state the general rule negatively, the property does not pass before shipment; see Benjamin,para. 1821.

4) Colley v. Overseas Exporters [1921] 3 K.B.302

5) Stein, Forbes and Co. Ltd. v. County Tailoring Co.(1917)

Moreover, it has been held that if the seller has shipped the goods after the buyer's repudiation of an fob contract, damages are the only remedy available to him.(6) But there is a suggestion to the effect that this rule may need revision(7) in the light of a later case in which it has been held that the injured party is not bound to accept the other's repudiation; instead, he may continue the performance of his obligations where he would then be entitled to claim the contract price.(8)

The second situation is where the contract stipulates that payment is to be made on a date certain irrespective of delivery. Indeed, this seems to be an application of the principle that whether such an action may be maintained, though the property has not passed, depends entirely on the terms of the contract.(9) A day certain means a time specified in the contract not depending on a future contingent event.(10) Thus where payment is to be made cash against documents, e.g., cif contracts, the subsection does not apply.(11) It is irrelevant whether payment on a day certain is to be made before or after delivery.(12)

140- =) 86 L.J.K.B. 448.

6) A.A. Nortier and Co. v. WM Maclean Sons and Co. (1921) 9 Lloyd's Rep. 192.

7) Benjamin, para. 1287.

8) White and Carter (Councils) Ltd. v. McGregor [1962] A.C.413.

9) Sutton, p 411.

10) Shell-Mex Ltd. v. Elton Cop Dyeing Co. Ltd. (1928)34 Com. Cas. 39, 43.

141. Contrast with damages: English Law

The seller's claim for damages under s.50 of the SGA is available where the buyer neglects or refuses to accept and pay for the goods. It is submitted that this section is confined to the situation in which the avoidance of the contract is inevitable.(1) But damages in a wide sense may also be available to the seller even if the buyer has accepted the goods and paid the contract price. For example, the buyer, who delays in taking delivery, may be bound to compensate the expenses incurred by the seller because of that delay;(2) in such a case, neither acceptance of goods nor payment of the price seems to be relevant.(3)

Suppose, on the other hand, that the property has passed to the buyer, or that payment is to be made on a day certain; suppose too that the buyer refuses to accept and pay for the goods. In this case, the seller has the option to claim either damages under s.50 or the price under s.49; but he cannot , of course, claim both. If, however, the buyer also fails to perform any other obligation, e.g., taking delivery, the

---

140- 11) Stein case, supra, 448; a similar principle applies to an fob contract where it provides for its implementation by delivery of documents, not goods, and payment is to be made against such delivery (Fridman, pp 380 f).

12) But see the comment of Atiyah, p 323.

141- 1) Supra, para. 94.

2) See Benjamin, para. 1295; see also para. 94, supra.

3) As has been seen, the buyer may accept the goods even before taking delivery of them (supra, para. 94).

seller may claim the price and, apart from s.50, damages as well.

Finally, it is to be remembered that the seller cannot claim the price when the contract is avoided.(4) On the other hand, it may be that he is entitled to combine a claim for special damages for the mere delay in making payment with a claim for the price.(5)

141- 4) Supra, para. 45.

5) Supra, para. 96.

CHAPTER IV:

EXEMPTION FROM LIABILITY

142. Texts

Art. 74 of ULIS provides that:

"1- Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which, according to the intention of the parties at the time of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended.

2- Where the circumstances which gave rise to the non-performance of the obligation constituted only a temporary impediment to performance, the party in default shall nevertheless be permanently relieved of his obligation if, by reason of the delay, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract.

3- The relief provided by this Article for one of the parties shall not exclude the avoidance of the contract under some other provision of the present Law or deprive the other party of any right which he has under the present Law to reduce the price, unless the circumstances which entitled the first party to relief where caused by the act of the other party or of some person for whose conduct he was responsible."

While Art. 79 of the Convention provides that:(1)

"1- A party is not liable for a failure to perform any of

his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

2- If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:-

a- he is exempt under the preceeding paragraph; and

b- the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

3- The exemption provided by this article has effect for the period during which the impediment exists.

4- The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform

---

142- 1) For a legislative background of the text, see the following documents successively: A/CN.9/87, annex 2, Passim; paras. 107 ff of the original document, and annex 1, art. 76 (previously art.74); A/CN.9/100, annex 2(VI); paras. 101 ff of the original document, and annex 1, art.50(76);A/CN. 9/116, annex 1 (art.50); A/32/17, annex 1, paras. 432 ff, and para. 35 of the original document (art.51); A/33/17, para. 28 (art.65); A/CONF.97/19, pp 133-136, 378-387, (paras. 1-10), 408-412, 164 (art.65) and 227 (paras. 26 f.).

knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

5- Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."

143. Generally

It frequently happens that the failure by one party to perform his contractual obligations is due to events beyond his control which he can neither overcome nor avoid. Many examples of this type of events may be given, such as war, strikes, governmental restrictions (e.g., embargo, exchange control), storm, fire, requisition, and closing of international waterway (e.g., Suez Canal or Strait of Hormoz).(1) Sometimes, an intervening event may even render performance impossible; an obvious illustration of this is the situation in which the subject-matter of the sale, on the assumption it is uniuqe,(2) is physically destroyed.(3) In these circumstances, it may not be fair to consider the party who fails to

---

143- 1) As has been noted, such events have occurred in the past and can be expected to occur in the future; see A/CN.9/116, annex 2, comment on art.50, para. 5; A/CONF.97/5, comment on art.65, para. 5.

2) A/CONF.97/5, ibid, para. 4; see also example 65 A, and compare example 65 B (ibid). Cf., in English Law, s.7 of the SGA "specific goods".

3) See, by way of contrast, Taylor v. Caldwell (1863) 32 L.J. Q.B. 164, the music-hall which was the subject-matter had been destroyed before the day of performance. Held, that =

perform liable for damages for the mere non-performance.(4) In reality, this is not the case in any of the laws relevant to this study though there are, as will be seen later, considerable divergencies between them.

As far as payment of the price is concerned, however, it is obvious that the situations to which the doctrine of exemptions applies are rare in practice. This is due to the fact that the price is to be expressed in money(4a) and therefore paying it may not, in most cases, be impeded by extraneous events. For that reason, it has been argued that payment of the price is an absolute obligation which is never legally impossible to perform; and on the basis of that assumption, it was suggested, while preparing the draft convention, that the relevant provisions should not be applied to that obligation.(5)

Furthermore, it may be that the doctrine of exemptions as a whole becomes of less importance where the contract itself determines in advance the rights and obligations of the parties when certain events beyond their control occur, whether or not those events lead to the exemption from liability. It has rightly been noted that such clauses are frequently

---

143- =) the defendents were excused from liability and that no action would lie against them.

4) But the court is empowered in English Law to make adjustment of the parties mutual rights and obligations in accordance with the Law Reform (Frustrated Contracts) Act 1943; see in detail Cheshire, Fifoot and Furmston,pp 527 ff.

employed in practice(6) particularly in standard contracts and general conditions which are widespread in international trade, and such an agreement is legally valid.(7)

144. Terminology

The expression "frustration" is well-admitted in English Law to mean, in general, that situation in which the contract comes to an end automatically(1) if its performance by either party becomes physically(2) or legally(3) impossible, or only possible in a very different way from that originally contemplated.(4) The equivalent doctrine in French Law is the

---

143- 4a) Supra, para. 5.
5) A/32/17, annex 1, para. 441; but that proposal was rejected (ibid, para. 443); see also A/CN.9/87, para. 111.
6) Schmitthoff's Export Trade, 7th ed. 1980, p 121.
7) Para. 144, below.

144- 1) Hirji Mulji v. Cheong Yue Steamship Co. Ltd. [1926] A.C. 497, 505; Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd. [1942] A.C. 154, 163. For a criticism of the automatic avoidance particularly in frustrating delay, see Stannard, 46 M.L.R. 1983, pp 738, 744 ff.
2) E.g., the destruction of the subject-matter of the contract; see Taylor v. Caldwell (1863) 32 L.J.Q.B. 164.
3) E.g., where the performance of the contract involves trading with the enemy as a result of the outbreak of war; see Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. [1943] A.C. 32. So that, the supervening illegality resulting from the war and not the declaration of war is the frustrating event, see Vivana Shipping Co. Ltd. v. Finelvet A.G. (The Chrysalis) [1983] 1 Lloyd's Rep. 503.

"force majeure".(5) The main aspects of both doctrines will be considered later; suffice it here to say that the occurrence of either excludes the liability for non-performance.

The term "force majeure", on the other hand, is frequently used in international contracts especially in modern practice of English traders. It is familiar, in this context, to insert in a contract a so-called "force majeure" clause; although it seems that this term has no precise (and comprehensive) meaning,(6) it may be that it (normally) includes, as has been observed, every event beyond the control of the parties.(7) So that, the "force majeure" has a more extensive meaning than the term "Act of God";(8) while the latter only refers to events due to natural causes(9) as an earthquake, the former includes, in addition, any event caused by human

---

144- 4) Halsbury's laws of England, vol.9, 4th ed., para. 450; or in case of non-occurrence of some event which must reasonably be regarded as the basis of the contract (Cheshire, Fifoot & Furmston, p 517). An illustration of this is the case of Krell v. Henry [1903] 2 K.B. 740 where the defendant hired a flat to view a coronation procession which did not take place on the days originally fixed. Held, that the contract was frustrated, see further paras. 147, 157 post.

5) Or "cas fortuit" (Article 1148 of the C.C).

6) See Thomas Borthwich (Glasgow) Ltd. v. Faure Fairclough, Ltd. [1968] 1 Lloyds Rep. 16, 28.

7) Schmitthoff, Export Trade, p 121.

8) Matsoukis v. Priestman and Co. [1915] 1 K.B. 681, 686.

9) Trent and Mersey Navigation Co. v. Wood (1785)4 Dougl. K.B. 286, 290; E.R.(99)884, 886; see further Halsbury's Laws of England, vol.9, para. 458.

intervention as strikes and governmental restrictions.(10) The purpose of a force majeure clause is clear; it defines in advance the mutual rights and obligations of the parties if certain events beyond their control occur; and such a clause is generally valid in both English(11) and French Law.(12)

However, neither ULIS nor the Convention has used any of the above terms; instead, both use the term "exemptions"(13) as equivalent to "frustration" in English Law and to "force majeure" in French Law.(5) The reason for that may be clear, that is, to avoid any misinterpretation which is likely to occur in practice if either of these two terms were adopted. And this may also be the reason why the various standard contracts and general conditions prepared under the auspices of the ECE, have used either "cases of relief"(14) or "reliefs".(15)

1. Requirements

145. Buyer's failure

The doctrine of exemptions presumes, in the language of the Convention, that there is a "failure" by the buyer "to

---

144- 10) See Benjamin, para. 665.
11) See in detail Schmitthoff, ibid, pp 121 ff; see also Cartoon, 1978 J.B.L. p 230.
12) Mazeaud, t.,2, vol.1, para. 581.
13) Ch.5, s.2 of ULIS; part 2, s.4 of the Convention.
14) See e.g., s.10 of nos. 188, 574; s. 18 of no.420.

perform any of his obligations", or, in the language of ULIS, that he "has not performed one of his obligations."(1) Following these words, it might be argued that it would be difficult to talk about the non-performance of, or the failure to perform, an obligation without assuming the maturity of that obligation; if this is correct, the result is that the doctrine does not apply where the buyer's breach is anticipatory. But this is not exactly the situation where it has been suggested that the buyer would be exonerated from liability if his anticipatory breach is inferred from circumstances other than his words or conduct(2) provided, of course, that the other conditions of the exemption are met. So that, in applying the doctrine no difference may appear between whether the breach is actual or anticipatory.

However, the buyer's failure to pay may relate to any duty imposed upon him in respect of payment; this includes the time, place and method of payment.(3) But it should be

---

144- 15) See e.g., s.10 of nos. 730; s.19 of no.1 A (cereals: cif-maritime); s.16 of no.5 A (cereals: fob-maritime).

145- 1) There was a proposal to replace those words in the draft convention by "his obligations" to indicate that there might be a failure to perform more than one obligation, but that proposal was rejected, see A/32/17, annex 1, para. 440.

2) Supra, para. 66.

3) In an earlier stage of drafting the text of the Convention, reference was expressly made to the failure to perform"in accordance with the Convention and the contract", see A/CN. 9/87, para. 115, and annex 1, art.76(74), alternatives A and B.

remembered that he is presumably entitled to cure any failure to perform so long as the contract is still alive and the time of payment has not expired yet.(4)

On the other hand, it has rightly been observed that the approach of ULIS and the (draft) convention is entirely consistent with Civil Law system. Both talk about the failure to perform any (or one) of the contractual obligations and not about the non-performance of the contract (or any part of it) as a whole.(5) This is indeed the approach of French Law in which the inexecution resulting from a force majeure event is concentrated on the obligations and not on the contract itself.(6) Thus, a party may be exonerated from further performance of such an obligation which has been affected by the force majeure(7) while other obligations may, depending on the case, survive.(8) But for the Common Lawyer, this approach is uncomfortable; he does not usually think in terms of obligations of the parties and, therefore, his doctrine of frustration (generally)(9) applies to the whole contract or to nothing.(10)

145- 4) Supra, paras. 41, 132.
5) Nicholas, 27 A.J.C.L. 1979, pp 231, 234 f; also in 48 Tul. L.Rev. 946, 956.
6) See Art. 1147 of the C.C. (cause etrangère).
7) See Marty et Raynaud, para. 491, post.
8) But cf., para. 156.
9) As to frustration of part of the contract, see Chitty, vol.1, para. 1534; Halsbury's Laws of England, vol. 9, para. 465.
10) Nicholas, 27 A.J.C.L. 1979, p 235.

146. The appropriate test

Under ULIS, the non performing party is excused from liability if it is proved that the non-performance is "due to circumstances which ... he is not bound to take into account ...". This language was liable, while discussing the draft text of the Convention, to various criticisms.(1) The main objection was that a party, say the buyer, had been afforded an opportunity to excuse his non-performance by relying on a wide range of factors;(2) so that, he could readily be excused from liability for the non-performance.(3) For example, he might argue that the non-payment was due to an unforeseen fall in prices.(3a) Therefore, it may be that ULIS covers two situations in which the buyer may be exempted from liability;(4) the first is where performance becomes impossible which is the case in both English(5) and French(6) Law. The other is the situation in which the performance merely becomes onerous(7) for unexpected reason which is not the case in either English(8) or French(6) Law.

146- 1) See generally A/CN.9/87, annex 3.I; A/CN.9/87, paras. 108ff; A/CN.9/100, annex 2-VI; but cf., Berman, who says that ULIS contains an excellent general definition of excuse of non-performance in Art 74 (30 L. and Con. Prob. 1965, p 354, 357).

2) A/CN.9/87, annex 3, ibid, para. 2.

3) A/CN.9/87, para. 108.

3a) But see Document V/Prep/1, in Hague Conference, vol.2, p 40 where it is argued that those who prepared draft ULIS have unanimously recognized that an increase in prices does not amount to a reason for exoneration unless it is the result =

Accordingly, there was a proposal to replace the word "circumstances" by "impossibility" or alternatively by "impediment".(9) But it was noted that the test of impossibility would lead to ambiguity since it had different meanings in different legal systems;(10) and the result was the adoption of the latter word i.e., "impediment".

Furthermore, in an earlier stage of preparing the relevant text of the Convention, an express reference was made to "fault";(11) that is to say, that the alleged impediment had occurred "without fault" by the non-performing party. But there was a clear tendency to exclude that term from the text(12) on the ground that it would be possible to define the exemption in objective words without reference to

---

146- =) of a general convulsion in economic circumstances.

4) A/CN.9/87, annex 3, para. 50.

5) Supra, para. 144.

6) Carbonnier, para. 74; Marty et Raynaud, para. 485;Mazeaud, t.2, vol.1, para. 576.

7) It may be interesting to note that while CITC distinguishes between the impossibility of performance and non-liability for damages, it expressly provides that performance shall be deemed possible even if it becomes more onerous or results in great expenditures to the debtor (s.245.2).

8) See e.g., Davis Contractors Ltd. v. Fareham Urban District Council [1956] A.C. 696.

9) See the alternative proposals (A) and (B) of the draft convention, A/CN.9/87, para. 115, and annex I, art. 76(74).

10) A/CN.9/100, annex 2, para. 4.

11) See A/CN.9/116, annex I, art. 50 as adopted by the W.G.

12) A/CN.9/125, add. 1 and 2 (Austria, para. 6; F.R of Germany, para. 25;Norway, para. 40; ICC, para. 52). See also =

"fault".(13) That suggestion was adopted without ignoring the fact that a party should not be exempt from liability if the cause of the non-performance was his own fault; and that might be achieved by providing that the impediment must have been "beyond his control",(14) i.e., the control of the non-performing party, which is the present test under the Convention.(15)

147. Causes of non-performance

Under the Convention, therefore, the buyer may not be exonerated from liability unless his failure was due to an impediment which should also be beyond his control. Although the expression "impediment" is a matter of construction, it is assumed that it rather means the impossibility of performance and this may be the draftsmen's intention though the term "impossibility" was intentionally excluded.(1) Anyway, it may be that the buyer's inability to perform, which is due to his financial troubles in general such as his insolvency or bankruptcy, may not be regarded as an impediment excusing the non-performance.(2)

146- =) A/32/17, annex 1, para. 438.
13) A/32/17, annex 1, para. 438.
14) Ibid, para. 439.
15) Below, para. 148.

147- 1) Supra, para. 146.
2) See also A/CONF.97/5, comment on art. 65, para. 10. This principle is expressly adopted by CITC (s.245 and the comment of Kopac thereto, p 83; s.252.2).

Likewise, the contract may give the buyer the option to perform in accordance with one of several modes of performance; in such a case, it is suggested that the performance is not deemed to be impeded so long as it is still possible to make it in accordance with at least one of these modes.(3) To illustrate, suppose that a contract calls upon the buyer to make payment either cash in a specific place or by a letter of credit; suppose too that the payment in that place became impossible. In this hypothesis, payment should be made by a letter of credit and the buyer could not therefore plead the exemption from liability.

Undoubtedly, there is no difference between whether the impediment is due to legal causes as a governmental exchange control or a law prohibiting dealings with the seller, or to physical causes as an earthquake or a flood at the place of payment. While the former events are clearly due to human intervention, the latter are natural events due to an "Act of God".(4) Once again, no practical benefit could be obtained from any of these distinctions.(5) The significant distinction is that which may be made between permanent and temporary impediments;(6) both excuse the buyer's non-

---

147- 3) A similar rule is expressly stated in CITC where s.247.I provides "If one of several optional performances becomes impossible, the obligation shall be reduced to the remaining ones."

4) See para. 144, supra.

5) Cf., s.252 of CITC in which the circumstances impeding performance should be "of extraordinary nature".

performance, but while the former would certainly lead to the extinguishing of the obligation as such, and sometimes to avoiding the whole contract,(7) this is not necessarily the case in the latter.(8)

If, however, the understanding of the term "impediment" in the Convention is correct, that is to say that it means "impossibility", then one may well say that the Convention is in line with French but not English Law. Under the former, any intervening event does not constitute force majeure unless it leads to the impossibility of performance.(9) In fact, this is not necessarily the situation in English Law. According to which, the frustration may occur where, in addition to the case of impossibility, the object which is the foundation of the contract becomes unobtainable even if its performance is literally possible.(10) On the other hand, the contingency might be temporary(10a) but performance, if resumed, would

---

147- 6) A particular reference is made to this distinction by CITC (s.252.1).

7) This is at least the case in English and French Law (supra, para. 144; post, para. 156), while this question in ULIS and the Convention is, as submitted, subject to the law applicable to the contract (post, para. 156).

8) Post, paras. 156 f.

9) The impossibility in French Law must, moreover, be absolute and not relative; see Carbonnier, para. 74; Marty et Raynaud, para. 485; Mazeaud, t.2, vol.1, para. 576.

10) See para. 144 (and note 4) supra.

10a) See generally stannard, 46 M.L.R. 1983, p 738.

involve something radically different from that contemplated by the parties when the contract was made. In such an event too the delay in performance would lead to frustration.(11)

Whether the doctrine of "exemptions" in ULIS applies to the former situation is not clear, but it may be sound to assume that the words "due to circumstances ..." are wide enough(12) to cover it. The situation in the Convention seems to be different since the performance has not actually been impeded. As to the other situation, it is granted that the non-performing buyer is exempted from liability so long as the impediment exists; and to this extent ULIS and the Convention are in agreement;(13) but it would be seen latter that these (two) laws differ from each other with respect to the effects of the intervening event after it is removed.(14)

148. Extraneous cause

As has just been indicated, the current test under the Convention is that the obstacle impeding performance by one party should be "beyond his control."(1) It is plain from this phrase and its legislative background that the buyer would not be exempted from liability where the impediment

---

147- 11) See e.g., Metropolitan Water Board v. Dick, Kerr & Co. Ltd. [1918] A.C. 119, 139. See also supra, para. 144 and the authorities cited therein (note 4).

12) See supra, para. 146.

13) Post, para. 155.

14) Post, para. 157.

was due to his fault. This question is ultimately a matter of proof where the onus is rested, as will be seen later, with the non-performing buyer. But it must be remembered that whether the intervening event is due to natural events or to a human intervenion is an irrelevant factor.

Although ULIS does not contain an express requirement as such, it may be wise to assume its adoption thereunder.(1a) Generally speaking,(2) it would be difficult to exempt a party from liability because of an intervening event where that event was due to his fault. In addition, it might be that the requirement that the event should neither be foreseeable nor be resistable, which would be considered below, would necessarily lead to a similar result.

However, this requirement is in line with French Law in which a force majeure event should be due to a "cause etrangère" which cannot be imputed to the party seeking exemption.(3) In

---

148- 1) However, it has been noted that this phrase is vague and difficult to apply in some legal systems (A/32/17, annex 1, para. 439). But see the opinion of ICC where it is considered that from business contracts the expression "beyond his control" is more familiar than "fault" and would therefore be preferable to the latter (A/CN.9/125, and add 1-3, ICC: para. 52).

1a) See also Document V/Prep/1, in Hague Conference, vol. 2, p 201 where it is argued that the "principle is clear : the cause of release must be external to the activity or the business of the party who pleads it".

2) See Cheshire, Fifoot and Furmston, p 524 (below); see also Chitty, para. 1569.

English Law, too, it is settled that the essence of frustration is that it should not be caused by the act or election of either party;(4) thus, reliance cannot be placed on a "self-induced frustration".(5) Notwithstanding that, it has been suggested that the phrase "self-induced frustration" does not imply that every degree of fault will preclude a party from relying on the doctrine.(6)

149. Unforeseeability: ULIS

Moreover, the buyer would not be exempted from liability unless it is proved, in the words of ULIS, that "he was not bound to take" the intervening event "into account". As has rightly been observed, certain events as wars, storms and currency restrictions have all occurred in the past and can be contemplated to occur in the future.(1) Thus it might be difficult for the buyer to prove, in a given case, that he was not bound to take some event into account. For that reason, this matter depends upon "the intention of the parties at the time of the conclusion of the contract". Granted that this phrase is vague, it is suggested that it refers to the parties' intention as stated in the contract,(2) which

---

148- 3) See Article 1147 of C.C.; see also Mazeaud, t.2, vol.1, paras. 572, 557.

4) See e.g., Joseph Constantine Steamship Line Ltd. v.Imperial Smelting Corporation Ltd. [1942] A.C. 154, 160; Maritime National Fish Ltd. v. Ocean Trawlers Ltd. [1935] A.C. 524.

5) Bank Line Ltd. v. Arthur Capel and Co. [1919] A.C.435,452.

6) Cheshire, Fifoot and Furmston, ibid.

frequently happens in the form of "force majeure" clauses. In other words, some events may be stated in the contract which may also indicate, whether expressly or implicitly, their effects. In that case, reference is to be made to the parties' intention as inferred from, or expressed in, the contract.

For example, a contract may provide that an exchange control by the buyer's country does not affect his duty to pay; or that the goods sold are to be delivered as soon as war breaks out on the assumption that it was inevitable. In these two hypotheses, it is obvious that the buyer is bound to take the relevant event into account and cannot therefore plead exemption if it occurs.

If this understanding is correct, then two points should be noticed. Firstly, a particular reference to the "time of the conclusion of the contract" appears to be superfluous. Indeed, that time is necessarily the only relevant time since the parties' intention could only be inferred from the contract. Secondly, it may be that any contractual term to the effect that the buyer is bound or, on the contrary, not bound

---

149- 1) A/CN.9/116, annex 2, comment on art. 50, para. 5; A/CONF. 97/5, comment on art.65, para. 5.

2) See also Document V/Prep 1, in Hague Conference, vol. 2, p 39 where it is argued that the successive criterion is to be resorted to in case of default of agreement. Cf., A/CN.9/87, annex 3.I (the representative of Ghana, para. 7-d). But see a proposal by Norway in which there was an express reference to circumstances contemplated by the =

to take certain events into account is a valid term, and this may be regarded as an exception to the general rule in ULIS stating that the Law does not govern the validity of the contract or of any of its provisions.(3)

But the parties' intention may not be expressed in the contract. In such a case, ULIS provides that "in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended".(4) The reasonableness is a question of fact to be determined in the light of the surrounding circumstances at the time of concluding the contract. This statement is clearly hypothetical;(5) in addition, it may creat difficulty in practice since a reasonable buyer and a reasonable seller might well have intended quite different things.(6)

150. Unforeseeability: other laws

Under the Convention, by contrast, the test is quite different; it directly depends on the reasonable expectation of the non-performing party. So that, if a buyer, who reasonably expected the occurrence of some event, entered into a contract, he would take the risks of that event. In spite of this divergency between ULIS and the Convention, they are in

---

149- =) contract (ibid, IX, para. 1).
3) In accordance with Art.8 of ULIS (supra, para. 21).
4) Thus, the test is of objective nature (Document V/Prep/1, in Hague Conference, vol. 2 p 40).
5) A/CN.9/125, and add 1-3 (ICC, para. 49).
6) A/CN.9/87, annex 3.1 (the representative of UK, para. 2-c).

agreement to the effect that the foreseeability, contemplation, expectation or the like is to be considered at the time of making the contract.

In French Law, too, it is an essential requirement for establishing the force majeure that the intervening event was unforeseeable at the time of making the contract.(1) This is not exactly the case in English Law where a distinction seems to have been made between whether the intervening event was foreseeable by both parties or only by the party who alleges frustration.

In the latter situation, that party cannot generally(2) plead frustration upon the occurrence of the foreseeable event,(3) which is similar to both ULIS and the Convention. But in the former various rules are applied. Prima facie, a contract may be frustrated even though the parties foresaw or ought to have foreseen the event,(4) and frustration in this case mainly depends on whether or not the contract includes a clause dealing with the event in question. If so, the general rule is that the doctrine does not apply but rather the parties' agreement.(5) But this rule is subject to two exeptions where the doctrine applies to both; the first is the

---

150- 1) Carbonnier, para. 74.
2) See Treitel, Law of Contract, pp 681 ff.
3) Walton Harvey Ltd. v. Walker and Humfrays Ltd. [1931] 1 Ch. 274.
4) Halsbury's Laws of England, vol.9 para. 456; see also Chitty, para. 1537.
5) Chitty, ibid; Treitel, ibid, pp 675 f.

case in which the frustration is grounded on the illegality resulting, for example, from war;(6) the second is where the contingency assumes a more fundamental and serious form than the parties envisaged in their contract.(7) But if the contract does not include a clause dealing with the frustrating event, then it is a matter of construction whether the parties intend that the event, if it occurs, does not affect the contract;(8) or they intend that the contract would be frustrated upon the occurrence of that event.(9)

Apart from the parties' agreement, it is obvious that the doctrine of "exemptions" in the Convention concentrates on the foreseeability through the non-performing party while the view of the other party appears to be irrelevant. The result may be that the doctrine does not apply whenever the event, according to the appropriate test, was foreseeable by the non-performing buyer even if it was also foreseeable by the seller; and this understanding would lead, in some cases, to disagreement with English Law.

151. Irresistible events

To exempt the buyer from liability for his non-performance, it should also be proved that the unforeseeable event

---

150- 6) Ertel Bieber and Co. v. Rio Tinto Co. Ltd. [1918] A.C.260.

7) Cheshire, Fifoot and furmston, p 521; see e.g., Pacific Phosphate Co. Ltd. v. Empire Transport Co. Ltd. (1920) 36 T.L.R. 750 "... the change in circumstances was so great that the doctrine of frustration applied."

8) See e.g., Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia) [1964] 2 Q.B. 226, 238-239.

9) See Halsbury's Laws of England, ibid; or they intend that the effect of the event, if it occurs, to be determined by any relevant legal rules (Chitty, ibid).

was irresistible. This requirement in ULIS and the Convention is in line with French Law;[1] and it could be achieved by proving that the buyer could not, in the language of the Convention, reasonably be expected to have avoided or overcome the impediment itself or its consequences. Again, the language of ULIS is different where the same formulation of the unforeseeability test is used here; that is, the non-performance "was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he[2] was not bound ... to avoid or to overcome". And "in the absence of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended."

In the above discussion, some notable differences between the two laws have been shown; while ULIS uses the phrase "was due to circumstances..." and concentrates on the parties' intention or alternatively on the intention of reasonable buyer and seller, the approach of the Convention is completely different. Bearing that in mind, one may conclude that the requirement under the present discussion also manifests two differences between them.

The first is that the Convention requires that the buyer

151- 1) Marty et Raynaud, para. 487. See also s.252.1 of CITC "which ... cannot be averted by the party obliged...", and subsection 2"... obstacles... which the debtor was bound to overcome or remove ... shall not be considered as circumstances excluding responsibility".

2) I.e., the non-performing party.

could neither avoid nor overcome the impediment itself or, subsequently, its effects. But ULIS only refers to the former, i.e., to the inability of avoiding or overcoming the intervening event. This difference, as suggested, is of formal nature and it is therefore doubtful that it may give any practical benefit.(3)

The second is that the time of concluding the contract is, under ULIS, the only relevant time for determining whether or not the event is irresistible according to the proper test; but in the Convention no reference has been made to such time at all.(4) This difference is of practical importance; at the time of making the contract, it might not be expected from the buyer, or from a reasonable buyer, to overcome the event but it might be so at a later time particularly at the time at which the event has occurred. This may be illustrated by the following example.

Suppose that at the time the contract was made a buyer had only one place of business and one bank account in state (x). In an unexpected step, an exchange control was imposed by that state where it became impossible for him to remit the contract price. Suppose too that, at the time of

---

151- 3) In the draft convention as approved by the W.G. the relevant wording was as the same as in ULIS; it had then been changed by UNCITRAL in its 10th session but the reason for that is not clear, see successively: A/CN.9/116, annex I, art.50.1; A/32/17, para. 35 (art.51.1).

4) Nor in CITC (s.252).

concluding the contract, he was not bound according to the appropriate test in ULIS to overcome that event. But in a later stage he opened several bank accounts in several countries where he could readily remit the sum from any of those countries. In this setting, the buyer might, under ULIS but not the Convention, plead exemption even if he did not make any attempt to overcome the event or its consequences. It is therefore submitted that the approach of the latter is preferable to that of the former; the relevant factor should be whether he can avoid the occurrence of the event and if not, then whether he can overcome it or its consequences. So long as the contract is still alive, it seems that the (exact) time of his ability to do so, which is the case in ULIS, is immaterial.

152. Onus of proof

The question of onus of proof is clearly settled in ULIS and the Convention, and they are in agreement to this effect. In both, the onus is rested with the non-performing party who claims the application of the doctrine. In such a case, he should prove; firstly, the occurrence of the intervening event and that event was, at least in the Convention, beyond his control; and, secondly, that the event in question was, according to the appropriate test, neither foreseeable nor resistible. In short, he is deemed to be liable unless he proves all these matters.(1) Likewise, Article 1147 of French Civil Code expressly provides that the debtor is liable unless he

proves that the inexecution resulted from a "cause etrangèr" which certainly includes the force majeure. So that the causation link between the debtor's conduct and the inexecution is presumed unless otherwise is proved.(2)

The approach followed in English Law is somewhat different where it has been held that once the supervening event has been proved which would, apart from the defendant's fault, frustrate the contract, the defence of frustration succeeds; this is so, unless the party alleging that the event was due to the other's fault, i.e., to "self-induced frustration" proves that fault.(3) In other words, the onus of proving the occurrence of the event lies upon the party relying on frustration and the proof of the fault is on the other party.

152- 1) In CITC too the burden of proof of both the impossibility of performance (s.249) and circumstances having the character of force majeure (Kopac, p 85, comment on s.251) is rested with the debtor. But it should be noted that the unforeseeability is not specifically required by CITC for establishing the doctrine of force majeure (s.252; see also Kopac in his comment thereto).

2) Mazeaud, t., 2, vol. 1, paras. 563, 571.

3) Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd. [1942] A.C. 154.

Section II

Effects

153. Notice by the buyer

The buyer who seeks exemption from liability is bound under the Convention to notify the seller of the impediment and its effects on his ability to perform. Such a provision may not be found under the doctrine of frustration in English Law(1) or of force majeure in French Law; nor does ULIS adopt it though its adoption seems to be in conformity with both practice(2) and other legal instruments prepared for international trade.(3)

If, however, the seller does not receive the notice within a reasonable time after the buyer knew or ought to have known of the impediment, the latter would be liable for damages resulting from such non-receipt. In this respect, two points should be observed.

Firstly, the risk of delay, error or loss in the transmission of the notice is to be born by the sender, which is

---

153- 1) Nicholes, 48 Tul. L. Rev. 946,957. But it is familiar that a contract which includes a force majeure clause (supra, para. 144) provides for such a notice.

2) See e.g., the following general conditions and standard contracts prepared by the ECE: s.10.2 of nos.188, 574 and 730; s.18.2 of no.420; s.19.4 of no.IA (cereals: cif maritime); s.16.4 of no.5A (cereals: fob maritime).

3) See e.g., s.248 of CITC (impossibility of performance); s.69 of COMECON General Conditions. A similar provision is adopted by DUSA (s.8.11-2,3). See also s.615-c of UCC =

contrary to the general rule in the Convention where the "despatch" theory has been adopted.(4) Secondly, the non-receipt of the notice by the seller does not prevent the buyer from relying on the doctrine and its effects, but he would then be liable for any damages sustained by the seller because of such "non-receipt". Of course, this term includes both absolute "non-receipt"either because the buyer has never sent the notice or because it has been lost in transmission, and improper receipt, e.g., a delay in transmitting the notice.

Finally, it is to be noted that the duty to notify extends to the situation in which the buyer intends to perform, by furnishing a commercially reasonable substitute(5) in compliance with his duty to avoid or overcome the impediment or its consequences; for example, he may remit the price in a currency different from that required by the contract.

154. Third person's failure

Art. 79.2 of the Convention reads: "If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him."(1)

153- =) (the non-performing party is the seller).

4) Supra, para. 59.

This provision is completely new and therefore has no counterpart in ULIS. Originally, it was intended to apply it only to the seller who might engage with a sub-contractor to perform any of his obligations arising from the original contract;[1] and so was the draft text as adopted by the Working Group.[2] For example (A), who is a seller of a machine, may contract with (B) to manufacture some of its parts; suppose that (B) does not perform his obligation towards (A) who, consequently, cannot perform his obligations towards the original purchaser. In this setting, (A) would be exempt from liability only if both (A) and (B) have met the requirements of the doctrine as discussed above. So, for instance, if (B)'s non-performance was due to his fault, (A) would be liable even if his non-performance was beyond his control.

But at the 10th session of UNCITRAL the word "seller" was replaced by the word "party" without giving any reason justifying that change.[3] In addition, the representatives at the Conference were in disagreement about the purpose and extent of the text.[4]

153- 5) A/CN.9/116, annex 2, comment on art.50, para. 13; A/CONF. 97/5, comment on art.65, para. 16.

154- 1) For a legislative background of the text, see the documents cited in note 1 of para. 122, supra.

2) A/CN.9/116, annex I, art. 50.2.

3) A/32/17, para. 35, art.51.2; the text was adopted by UNCITRAL after approving it by Committee of the Whole I established by the Commission; see the debate of the Committee, ibid, annex I, paras. 446-450.

However, as to form the text is not free from criticism where the phrase "the whole of the contract" seems to be inaccurate. It is granted that a party to a contract may be able to engage with a third person to perform all his obligations at the very most; but by no means can he require that person to perform the whole of the contract. Obviously, this is the draftsmen's intention. As to substance, the provision in its current form applies to both the seller and buyer. But its background, where the debate was mostly concerned with the seller's non-performance, gives no guidelines about the application of the text to the buyer's failure to perform.(5)

As far as the non-payment of the price is concerned, however, it may be that that text applies where the buyer pays the price, for example, by a (confirmed) letter of credit; suppose that the issuing bank has not properly performed his duty, the result of which is that the actual payment to the seller has delayed. In this case, it is possible to exonerate the buyer from liability for the delay(6) if the requirements of "exemptions" by applying them to both the buyer and issuing bank are satisfied.

154- 4) See in detail the debate of the First Committee in its 27th, 32nd and 33rd meetings, in A/CONF.97/19 particularly pp 379 (para. 24) and 380 (paras. 36-45).

5) See, however, the example given by Adal (of Turkey) who proposed the deletion of the text "... a buyer might excuse late payment on the ground that those who owed him money were also late with their payments ", (ibid, p 378, para. 21). But it is submitted that the text may never be applied=

Finally, it may be useful in this connexion to point out that it has been held in English Law that the seller must be treated, for the purpose of exempting him from liability for damages, as occupying the position of the sub-contractor. Thus, the former cannot rely on any defence which the latter would be disabled from relying upon.(7) This principle shows, to some extent, a similarity with the Convention. It has been argued, on the other hand, that the buyer's duty to furnish a documentary credit is not excused, also in English Law, by a delay caused by factors beyond his control.(8) Thus, in one case the delay was not literally due to the buyer's failure to open the credit but rather to the issuing bank. Nevertheless, it was held that the seller, who accordingly avoided the contract, was not liable for damages.(9)

154- =) to this setting.

6) On the assumption that the mere opening of the credit does not discharge, as has been held, the buyer from his obligation; and this is so unless there are circumstances from which it could be inferred that the opening of credit is to be regarded as an absolute payment. See e.g., E.D. & F. Mann Ltd. v. Nigerian Sweets and Confectionery Co. Ltd. [1977] 2 Lloyd's Rep.50; W.J. Alan and Co. Ltd. v. El Nasr Export and Import Co. [1972] 2 Q.B. 189. A similar principle is expressly stated in CITC (s.349).

7) Lebeaupin v. Richard Crispin and Co. [1920] 2 K.B.714,718.

8) Benjamin, para. 2172.

9) A.E. Lindsay and Co. Ltd. v. Cook [1953] 1 Lloyd's Rep.328.

155. No damages

One of the main effects of the doctrine, and sometimes the only effect, in both ULIS and the Convention is that the buyer is not liable for damages for his failure to perform.(1) This is so whether the intervening event is permanent or temporary and irrespective of whether the contract has been avoided or, in the latter situation, remains alive. A similar principle is applied in French Law in respect of force majeure.(2)

In English Law, too, where the contract is frustrated neither party is liable for damages for the failure of making further performance.(3) If, however, the event impeding performance is only temporary, the position of the case law is not clear. For example, it has been held that temporary impediments only suspend, but don't dissolve, the contract. In that case, however, the defendant remains liable in damages;(4) and this excludes, as has been said, the possibility that a temporary event, while not bringing the contract to an end, might be a defence to an action for damages for the delay in performance.(5) But in contracts for personal

---

155- 1) A similar principle is also applied in both DUSA (s.8.11) and CITC (s.250) despite the fact that the latter distinguishes between impossibility of performance, force majeure and frustration (ss.245-252,275).

2) Article 1147 of C.C. (cause étrangère).

3) See e.g., Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd. [1943] A.C. 32,70. But it has been noted that the philosophy of English Law with relation to the non-liability =

services it has been held that temporary illness, while not discharging the contract, will excuse the temporary non-performance of the employee.(6) Furthermore, it will be seen below that a temporary event may, in certain circumstances, lead to frustration.(7)

It is submitted, on the other hand, that the buyer's non-liability includes both damages in the narrow sense and interest although a literal construction of Art. 83 of ULIS may lead to a different understanding. This article provides that "where the breach ... consits of delay in payment,... the seller shall in any event be entitled to interest ...". It is suggested that the underlined words don't embrace the doctrine of "exemptions"; rather, they refer to the fact that the buyer is bound to pay interest even if the seller has suffered no loss which is completely irrelevant to such a claim.(8)

155- =) is different from that of French Law (Nicholas, 48 Tul. L. Rev. 946, 956).

4) Hadley v. Clarke (1799)8 T.R.259 ; E.R. (101) 1377; see also Jackson v. The Union Marine Insurance Co. Ltd. (1874) L.R. 10 C.P. 125, 135.

5) Nicholas, 27 A.J.C.L. 1979, p 236.

6) Who, further, must be paid wages during his absence, see Marrison v. Bell [1939] 2 K.B. 187 ; see also Cheshire, Fifoot and Furmston, pp 516, 525. But it has been suggested that this is not frustration in the strict sense, because the usual consequences of frustration do not apply (Chitty, para. 1534).

7) Post, para. 157.

8) Supra, para. 96.

Finally, it is to be remembered that the buyer is also exonerated from liability in case of anticipatory breach when such breach is inferred from circumstances other than the buyer's words or conduct.(9)

156. Effects on avoidance

While the principle of non-liability for damages clearly shows a great similarity, and sometimes a conformity, between the various laws relevant to this study, the effects of the doctrine on the existence of the contract demonstrate, on the contrary, considerable differences between them.

In English Law, a frustrating event brings the contract to an end automatically irrespective of the parties' will.(1) French Law approach is quite different although it may, in some cases, lead to a similar result. As has been indicated, the doctrine of frustration in the former is broadly concerned with the contract as a whole, while the force majeure in the latter is linked with the obligation arising from the contract.(2) Thus, in a given case it is possible in French Law that some of the contractual obligations extinguish as a result of a force majeure event while other obligations survive. Once again, this view is generally(3) strange to a Common Lawyer whose doctrine of frustration is applied to the contract as a whole or, as said, to nothing.(4)

155- 9) Supra, para. 66.

156- 1) Supra, para. 144.

2) Supra, para. 145.

However, the force majeure in French Law may lead to an automatic avoidance depending upon the nature of the obligation that has been affected by the intervening event. So far as payment of the price is concerned, this occurs as follows: Once the payment becomes impossible, it automatically extinguishes; at the same time, the correlative obligation of the seller, say the delivery, also extinguishes. The result is then clear; the contract becomes automatically avoided by operation of law.(5) Contrary to the general rule,(6) the court has no discretion in the matter; its role is confined to ascertaining whether or not the conditions of force majeure have been met; if so, it is then bound to announce avoidance(7) which is presumed to have already taken place.

The approach of the Convention is different from that followed in either English or French Law. It includes no reference to the effect that the contract (or any of its obligations) becomes automatically avoided as a result of an obstacle impeding performance. On the other hand, it expressly provides that the doctrine of exemptions, while excluding liability for non-performance, does not prevent either party from exercising any right other than to claim damages.(8) This language may lead to the conclusion that the contract may never come to an end automatically. Certainly, this is true where the

---

156- 3) See the authorities cited in para. 145, note 10, supra.
4) Nicholas, ibid, p 235.
5) Mazeaud, t., 2, vol. 1, particularly paras. 580 and 1110.
6) Supra, para. 20.
7) Mazeaud, ibid, para. 1110.

event is temporary which needs further consideration below; but when that event or say its effect on performance is permanent, it is submitted that the question becomes outside the scope of the Convention and this was indeed the clear intention of the draftsmen.(9)

ULIS' approach, in contrast, raises two points. In the first place, it expressly states that the doctrine of exemptions does not exclude the right of avoiding the contract,(10) which literally means, like the Convention, that an intervening event may never lead to an automatic avoidance. In the second place, it provides that the non-performing party is permanently relieved of his obligation if, by reason of temporary events, performance would be radically changed from that contemplated by the contract.(11) Apparently, these words mean that the obligation automatically extinguishes in these circumstances.(12) The question is therefore whether it is possible to assume that permanent events automatically result

---

156- 8) Art.79.5, supra, para. 142.

9) In the draft convention as approved by UNCITRAL in its 10th session (A/32/17, para. 35) the text of art.51.3 was "the exemption... has effect only for the period during which the impediment exists". But at the Conference, the word "only" was deleted as (an alternative) best solution based on the understanding that that paragraph and even the whole of the article did not contain a provision regulating a possible permanent relief (A/CONF.97/19, particularly p 381, paras. 52-53).

10) Art.74.3 (supra, para. 142).

11) Art.74.2 (supra, para. 142); see below, para 157.

12) Below, para. 157.

in extinguishing the obligation since events of temporary nature may lead to such a result.

However, it is submitted that ULIS and, as has just been indicated, the Convention have only faced the situation in which intervening events are of temporary nature, while the other situation, i.e., where those events are permanent, is outside the scope of the relevant provisions of either insofar as avoidance is concerned.

157. Temporary events and avoidance

According to the Convention, therefore, intervening events may never bring the contract to an automatic avoidance; nor can the non-performing buyer avoid it merely because the delay in performance renders it something completely different from that contemplated by the parties. In short, the position of the Convention is that avoidance in such a case is subject to the same principles applied to avoidance in general. Accordingly, either party is entitled to avoid(1) the contract only on the ground of either the fundamental breach(2) or additional time notice. The remedy of avoidance is to be sought elsewhere in this work. Indeed, many attempts were made(3) to the effect

---

157- 1) See Art.79.5 (supra, para. 142).
2) See A/32/17, annex I, para. 453.
3) See e.g., A/CN.9/87, para. 115 (alternatives A and B), and annex 3-I, para. 5.i; A/CN.9/100, annex 2-VI, para. 12 (art. 76 bis); A/32/17, annex I, para. 451; A/CONF.97/19, p 134 (a proposal by Norway for amending paragraph 3).

that the new convention should include a rule similar to that expressed in both ULIS and English Law,(4) but all those attempts had failed.(5)

Thus, the Convention sharply differs from ULIS in respect of this point where the rule under the latter is that the non-performing party is relieved of his obligation if, by reason of the delay resulting from temporary events, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract.(6) Certainly, this provision finds its substance under the doctrine of frustration in English Law(7) where in these circumstances the contract is frustrated.(8) However, the language of ULIS is somewhat questionable; it refers to the relief of the obligation affected by the intervening event, which mostly means an automatic relief by operation of law. The question which arises here is: Why this result is to be imposed upon the non-performing party who may not, for any reason, wish it?(9) Moreover, it is not clear from

---

157- 4) And, as has been said, similar to the "théorie de l'imprevision" in French Law, see A/CONF.97/19, p 381, para. 58.

5) See A/CN.9/100, para. 107; A/32/17, annex I, para. 453; A/CONF.97/19, p 382, para. 68.

6) A general principle to this effect is also stated in CITC (s.275.1) which adds "... neither a change in the financial standing of the debtor, nor a change in the economic situation in his country, nor a change of the conditions existing in international trade constitutes such change of circumstances".

7) Cf., note 4 above.

8) See supra, paras. 144, 147.

the text what is the effect of the relief on the contract as a whole or on other obligations arising from the contract; and this means that the solution is to be concluded from the general principles on which ULIS is based.(10)

It is important to note, however, that the relief does not exclude the avoidance of the contract under other provisions of ULIS.(11) Accordingly, the party expecting performance is entitled to avoid the contract even before the intervening event is removed if the requirements of avoidance are satisfied, which is the same, as has just been seen, in the Convention.

158. Effects on demanding payment

Of course, this question does not raise any difficulty in either English or French Law when performance becomes absolutely or say permanently impossible as a result of frustrating or force majeure events. In brief, in no case can the seller demand payment in such an event; this is due to the fact that the contract as a whole, or at least the obligation in French Law, does not exist any more. If, however, the event is temporary, then performance according to French Law is suspended for the period during which that event (or its

---

157- 9) Cf., a proposal which was presented to the W.G. by the representative of U.K. to the effect that the non-performing party "may declare the contract avoided" in those circumstances (A/CN.9/100, annex 2, ibid.).

10) In accordance with Art.17.

11) Para. 3 of Art.74 (supra, para. 142).

effect on performance) exists.(1) This is not exactly the case in English Law where a sharp distinction has been made between whether performance, if resumed, would be some thing radically changed from that contracted for or not. Some aspects of this question has already been considered.(2) In the latter situation, however, it may be that the party waiting performance is entitled to require it as soon as the event ceases to exist. But it is important to remember that temporary events, according to some cases, have no effect whatever.(3)

In ULIS and the Convention, by contrast, the question under the present discussion is not expressly solved. Putting aside the case in which intervening events are permanent, which has already been considered, it is submitted that the seller in not entitled to require payment as long as those events exist; and this seems to be a corollary of the doctrine. Notwithstanding that, many suggestions to this effect(4) were rejected by the draftsmen of the Convention;(5) instead, Art. 79.5 reads "Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention". The apparent meaning of these words is that a party can claim performance, say payment of the price, even if

---

158- 1) Marty et Raynaud, paras. 287,491; Carbonnier, para. 84.
2) See supra, paras. 144, 147, 155 and 157.
3) Supra, para. 156.
4) See e.g., A/CN.9/87, annexes 3.I and 3.IX, paras. 5.8 and 1 respectively; A/32/17, annex I, paras. 435 and 455 a; A/CONF.97/19, p 134-135 (F.R. of Germany).

the impediment is not yet removed. But it is doubtful to assume that this conclusion is strictly intended;(6) rather, a distinction should be drawn between whether or not the impediment still exists. If so, the seller cannot, as submitted, claim performance; if not, then performance should be resumed whereupon he would be entitled to such a claim.(7)

159. Failure caused by Seller

Article 80 of the Convention provides that:

"A party cannot rely on a failure of the other party to perform, to extent that such failure was caused by the first party's act or omission".(1)

Assuming, in principle, that this provision is of general nature and not confined to the doctrine of "exemptions", the main area in which it operates in practice is the remedy of damages.(2) To illustrate, suppose that the buyer's non-payment

---

158- 5) See A/32/17, annex I, para. 456; A/CONF.97/19, p 385, para. 44.

6) See, however, A/CONF.97/5, comment on art.65, para. 9, where it is considered that the other party retains the right to require performance, and it is a matter of domestic law as to whether a court will order a party to perform in these circumstances and subject him to the sanctions provided in its procedural law for continued non-performance.

7) See also the debate on that text in A/CONF.97/19, pp 383-385, particularly paras. 18,25,26,32 and 34.

159- 1) The text was added at the Conference according to a proposal submitted by Maskow (German D.R.); see A/CONF.97/19, pp 135,386 (paras. 50-64), 393(paras. 1-10), 164 (art.65 bis) and 227 (paras. 28-31).

in time was due to the seller's failure to nominate the bank through which the credit was to be opened; or that the latter has shown, without reservation, that he would accept payment in a currency other than that required by the contract, which has then been devalued.(3) In these two settings, it might be that the seller couldn't claim damages. But this principle applies only to the extent that the buyer's failure was caused by the former's act or omission. So, for instance, if in the above example part of the price was to be paid by a cheque and the balance by a bank to be nominated by the seller who failed to make such nomination, the principle would be applied to the latter situation but not to the former. It is the task of the court or arbitral tribunal to determine to what extent the seller's behaviour has caused the buyer's failure.(4) It has been observed, further, that the principle

---

159- 2) See also s.255 of CITC which reads "If the damage which was simultaneously caused by non-performance of a contractual or other duty of the injured party, such party shall bear a proportionate part of the damage". In French Law too the general rule in case of "faute commune" is that the victim is responsible for damage caused by his fault; see Mazeaud, t.2, vol. 1, para. 594; see also Starck, para. 2083.

3) See W.J. Alan and Co. Ltd. v. El Nasr Export and Import Co. [1972] 2 Q.B.189.

4) The original words of the proposal which were "... in so far as ..." had been described as sufficiently elastic to allow the court to determine each party's share of the responsibility, see A/CONF.97/19, p 393, para. 7 .

applies even if the seller's act or omission does not constitute fault.(5)

However, this principle has been inserted in the Convention under the doctrine of "exemptions" although there was a suggestion to place it under the title of "General Provisions".(6) In spite of that, it was noticed at the conference that such a rule had been set out once and for all in Art. 7 of the Convention; by virtue of the principle of good faith stated in that article, one could not take advantage of a failure of his own which impeded the other party from performing his obligations.(7) It was also noted that such a rule constituted a basic principle underlying the whole Convention and, accordingly, there was no need to state it in a particular provision.(8)

With relation to the doctrine of "exemptions" in particular, the main purpose of the principle is to cover the situation in which one of the parties is unable to perform any of his obligations because of an impediment beyond his control. In such an event, account should also be taken of the case in which the failure to perform could be imputed to the act or omission of the other party.(9) This party may not, for example, be entitled to avoid the contract. In short, it is

---

159- 5) Ibid.
6) That was the other alternative of the proposal; see also the debate on the text, ibid, paras. 1 ff.
7) Ibid., p 386, para. 55.
8) Ibid., para. 60.
9) Ibid., para. 50.

generally agreed that a party should not have rights based on his own (wrongful) action.(10)

In ULIS a particular reference is made to the remedy of avoidance;(11) an exemption given to one party does not deprive the other of his right to avoid the contract, unless the circumstances entitling the exemption were caused by the act of the other party or of some person for whose conduct he was responsible. For instance, a seller may change his place of business at which payment should be made,(12) and because of that the buyer may fail to make payment; if, in this setting, the requirements of exempting the buyer from liability have been satisfied, the seller cannot rely on the buyer's failure for avoiding the contract.

159- 10) Honnold Uniform Law, para. 436.

11) As well as to the reduction of the price which is a buyer's remedy, see Arts.74.3 (supra, para. 142) and 41 of ULIS.

12) Which is the general rule as regards place of payment under both ULIS (Art.59) and the Convention (Art.57); see supra, para. 9.

CHAPTER V:

SUSPENSION OF PERFORMANCE

160. Introduction

In addition to the remedies discussed above, i.e., avoidance, damages and recovery of the price, the aggrieved seller has also been given, in both ULIS and the Convention, the right to suspend the performance of any of his obligations on the ground of what may be described buyer's "prospective breach". The grounds and effects of this remedy are completely different from those relating to the remedy of "avoidance" when it is based on the "anticipatory breach" which has already been considered in this study.(1) It will be noted, on the other hand, that the grounds for suspending performance under the Convention are different from those adopted by ULIS; in addition, the former provides for the effects of suspension while those effects seem to have intentionally been ignored by ULIS. It is to be observed, further, that the expression "suspension of performance" also covers the seller's right to stop the goods in transit though, strictly speaking, this may not be the situation in theory. At least in the Convention, however, the stoppage in transit is clearly deemed to be an application of the doctrine of suspension.(2)

160- 1) Supra, Ch.I, s.IV.1.

2) See the first sentence of para.3 of Art.71 (post, para.176). Under both ULIS and the Convention, however, the remedy of suspension including the stoppage in transit has been inserted in one article.

On the other hand, both laws clearly indicate that the seller is entitled to withhold delivery of goods where the buyer's breach is actual.(3) But the main questions concerning this remedy find no answer under either law with the exception of certain rules concerning in particular some, but not all, effects resulting from it.

Finally, it may be useful to point out in advance that although the aggrieved seller has been given, under both English and French Law, the right to withhold delivery or even to stop the goods in transit, the "suspension of performance" as recognized by ULIS and the Convention has no counterpart in either. Likewise, the philosophy of the French principle of "exceptio non adimpleti contractus" which also means suspension of performance is quite different from that on which this remedy in international sale is based.

All these matters will be examined in the subsequent discussion under two headings as follows:

Section 1 : Availability of Suspension

Section 2 : Effects of Suspension.

160- 3) Supra, para. 10.

Section I

Availability

1. Grounds for suspension

161. Texts

Art. 73.I of ULIS provides that:

"Each party may suspend the performance of his obligations whenever, after the conclusion of the contract, the economic situation of the other party appears to have become so difficult that there is good reason to fear that he will not perform a material part of his obligations."

While Art. 71.I of the Convention(1) provides that:

"A party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of:

(a) a serious deficiency in his ability to perform or in his credit-worthiness; or

(b) his conduct in preparing to perform or in performing the contract."

In addition, there are some other relevant provisions which will be referred to in the subsequent discussion.

161- 1) For a legislative background of the whole Article, see the following documents successively: A/CN.9/87, annex 4, paras.49 ff; paras.90 ff of the original document, and annex I (art.73); A/CN.9/100, paras.100-101, and annex I, art. 47(73); A/CN.9/116, art.47; A/32/17 (annex I, paras. =

162. ULIS

So the seller's right to suspend performance turns, under ULIS, on two main factors.

It presumes, in the first place, that after the conclusion of the contract, the "economic situation"(1) of the buyer "appears to have become so difficult". This statement seems to be vague and may therefore raise many difficulties in practice.(2) The key question is whether there must be a change for the worse in the economic situation of the buyer after making the contract, or if it is sufficient that such bad situation, on the assumption that it has already existed, becomes apparent after that time. Obviously, the answer to this question is very important in practice. To illustrate, suppose that the buyer's financial position was, while making the contract, so difficult; but this fact has not come to the seller's intention until a later time. In this setting, the question is whether the seller can suspend performance irrespective of the fact that the buyer's position remains as the same as it was at the time of concluding the contract; or he cannot do so since it is his duty to investigate that position

---

161- =) 398 ff) and para.35 (art.48); A/33/17, para.28(art.62); A/CONF.97/19,pp 129-130,374-378,419-422,162 (art.62), 218-219 (paras.38-59) and 220 (paras.11-17).

162- 1) It has been observed that this expression is broader than "financial position" which was adopted by draft ULIS of 1956 (Graveson and Cohn, pp 93 f).

2) As to criticism of the text in general, see A/CN.9/87, particularly paras. 91, 93 and 99, and annex 4, paras.50 ff.

before entering into a contract with the buyer.

In solving this problem, domestic laws may be categorized into two groups.(3) The first adopts the former solution(4) while the other follows the latter.(5) As to ULIS, it seems that Art. 73 above is not free from difficulties of interpretation in practice. It may be said, on the one hand, that the purpose of the word "appear(s)" is that the economic situation of the buyer was bad or even hopeless when making the contract does not matter provided that the true position was not then "apparent".(6) On the other hand, it is quite possible to suggest that the phrase "have become so difficult" necessarily requires that the buyer's economic situation has, subsequent to the contract, changed to the worse to the extent that such new bad situation becomes "apparent" and this may be, it is submitted, the true position of ULIS. In draft ULIS of 1956, which was the basis of the current text , the relevant provision was clear to the effect that the difficulty in the buyer's (financial) situation should have occurred subsequent to the contract,(7) and this was also the

---

162- 3) See Cohn, 23 ICLQ 1974, p 525.

4) See Cohn, ibid (note 12), who referred to Art.1461 of Italian C.C. and ss.1025, 1066 of Austrian ABGB.

5) See eg., Art.1613 of French C.C. which will be considered below (para. 168); see also Treitel, Remedies, s.189,who referred to Art.321 of German C.C. (BGB). This approach is followed by the SGA with respect to the seller's lien (post, para. 168).

6) This appears to be the opinion of Cohn, ibid; but as regards the word "apparent" see below, para. 163.

7) Article 82 of the draft.

draftsmen's express intention.(8) But it is worth noting that the draft text did not contain the word "appear(s)" which came into existence at a later stage.

On the other hand, what the word "appears" used in the text means is not clear. It may indicate, as said, that the buyer's economic situation must be known within interested business circles;(9) but it is possible to say that the seller's own knowledge of this fact is sufficient(10) which may mean that this word refers to a subjective factor(11) Finally, the whole phrase "the economic situation of the other party appears to have become so difficult" has been criticised on the ground that it is too subjective(12) and, therefore, the evaluation of the buyer's economic situation is left to the seller's judgment.(13)

The second factor is that the foregoing test constitutes good reason to fear that the buyer will not perform a material part of his obligations. Setting aside the nature of breach for the moment, it may be that this statement is objective in nature; it does not depend upon the seller's own view, but rather upon the judgment of a reasonable person to be put in the same situation of the seller.(14)

162- 8) Document V/Prep/1, report on arts. 82 and 83.
9) Cohn, p 526.
10) See the examples given by the S.G. in A/CN.9/87, annex 4, paras. 52, 56.
11) See A/CONF.97/19, p 432, paras. 2 (Wang of China).
12) A/CN.9/87, para. 93.
13) Ibid, annex 4, para. 50.
14) See Cohn, pp 523 f.

In any case, it is beyond doubt that almost all the expressions used by ULIS for determining the appropriate test of suspension are elastic and therefore liable to different interpretations; so that it is not easy to envisage theoritically the real meaning of "economic situation", "appears", "so difficult", "good reason", "to fear" and /or "material part", which have been used for establishing the test. In brief, it is the task of court or arbitral tribunal to determine, on a case by case basis, both the meaning of each of these terms and whether the test has met its conditions.

163. The Convention

The test of suspending performance under ULIS as a whole has essentially been changed so far as the Convention is concerned. The main aspects of similarity and dissimilarity between the two laws will be considered below, and it suffices here to point out the two ingredients of the new test.

The first is dependant upon the fact that the buyer will commit a breach; that is, "if, after the conclusion of the contract, it becomes apparent" that he "will not perform a material part of his obligations". This statement makes it clear, on the one hand, that what should be "apparent" is the buyer's prospective breach and, on the other, that it suffices for satisfying the test that this fact becomes apparent after making the contract. Thus, it is immaterial that the grounds for breach, which constitute the second ingredient of the test, already existed at the time the contract was

concluded; what is crucial is whether the prospective non-performance based upon such grounds becomes apparent afterwards.(1) Moreover, the word "apparent" in the text seems to refer to an objective factor.(2) This means, that the question does not turn on the seller's own judgment, but rather on a reasonable seller to be put in the same circumstances.

The second ingredient is that the buyer's prospective breach should be inferred from one of the following events

Firstly, a serious "deficiency"(3) in his "ability"(4) to perform or in his creditworthiness. In reality, the buyer's inability to make payment arises, in most cases, from a deficiency in his creditworthiness. But this is not

---

163- 1) The draft text as approved by UNCITRAL at its 10th session adopted another view and this was the main purpose of a proposal submitted by F.R. of Germany to the Conference, which had been adopted, see /A/CONF.97/19, pp 129,374-376 (paras.40-70);also p 431, paras. 95, 99-100 and 106.

2) Ibid, p 431 particularly the speech made by Gregoire (France) on behalf of the ad hoc Working Group established for considering and submitting a proposed text; see also ibid, p 432, para.2. However, while discussing the text there was a clear divergency about which of the following words is best suited to the test:-"apparent", "appears", "evident" or "clear".

3) The word "deterioration" which appeared in the draft convention as approved by UNCITRAL had been replaced at the Conference by the word "deficiency". See, however, the comment of both Honnold (US) and Ziegel (Canada) on the latter word (ibid, p 375, paras. 51, 58).

necessarily the case. In his comment on the draft convention, the S.G. has indicated that the circumstances justifying the suspension of performance may relate to general conditions so long as those conditions affect the other party's ability to perform; for example, the outbreak of war may lead to the fact that one of the parties will not perform his obligations,(5) or the excahnge control imposed by the buyer's country where he becomes, as a result, unable to perform. In short, the cause of the buyer's inability to make payment is immaterial; nor is it relevant that his prospective non-performance might be excused on the ground of extraneous causes beyond his control.

It is to be noted, on the other hand, that a man may be liable to some deficiency in his creditworthiness or even to loss in his trade which is not unusual in normal commercial life. And that is perhaps the reason why the Convention requires that the deficiency should be serious which is a question of fact to be determined in the light of all surrounding circumstances.

Secondly, the buyer's conduct in preparing to perform or in performing the contract. As to the former situation

---

163- 4) Again, the word "capacity" was used in UNCITRAL's draft text. But it was noted that that word also referred to insane people (A/CN.9/125 and add 1 to 3-US, para. 23.h);and that was, perhaps, the reason for replacing it at the Conference by "ability".

5) A/CN.9/116, annex 2, comment on art. 47, para.4;A/CONF.97/5, comment on art. 62, para.4.

it may be interesting to remember Art. 54 of the Convention which reads:- "The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any laws and regulations to enable payment to be made." (6) So that even the primary actions taken by the buyer for timely payment are regarded as a part of his obligation to pay the price. (6) However, no practical benefit could be gained from distinguishing between whether the buyer's prospective breach is due to his conduct in preparing to perform or in performing the contract, since either justifies the seller's suspension of performance. It should be noted, further, that the language of the relevant provision seems to confine its application to the situation in which the buyer violates the same contract. So, for instance, if the same buyer and seller enter into two separate contracts and the former violates one of them, the latter cannot, as suggested, suspend the performance of the other; this is so unless of course the prospective non-performance of this contract is based on the first ground, i.e., on a serious deficiency in the buyer's ability to perform or in his creditworthiness.

164. Prospective breach

According to the above provisions in both ULIS and the Convention, the seller's right of suspending performance is

---

163- 6) Supra, para. 8; see also A/CONF.97/5, comment on art.50, para.2; Honnold, Uniform Law, para. 323.

confined to the situations in which the buyer "will not perform..." his obligations, i.e., to the case where the breach is "anticipatory" and not actual;[1] but to distinguish it from the anticipatory breach which has already been examined[2] it may be wise to describe the breach here as "prospective". And this fact obviously caused many difficulties to the draftsmen of the Convention especially at the Conference where one of the main questions was: Why there should be different provisions governing the same type of breach? Was it possible to lump them together[3]? It was noted, for example, that Art. 71 (prospective breach) was superfluous unless it had been included in the form of an addition to Art. 72[4] (anticipatory breach); and if the word "apparent" under the former were to be replaced by "clear" as was suggested;[5] then the whole relationship between the two provisions would become meaningless and the structure would collapse.[6] As a result, the provision under the present discussion (Art 71) came into existence in a form separate from Art. 72.

164- 1) The same may be true with respect to CITC (ss.213,363),UCC (s.2-609.I), DUSA(s.8.7-I) and some other domestic laws such as German and Swiss law (Treitel, Remedies, s.189).

2) Supra, Ch., I, s.IV.1.

3) See the proposal of Shafik (Egypt) and the debate on it, in A/CONF.97/19, pp 129, 420-422.

4) A/CN.9/125 and add. I to 3 (Bulgaria, para.7).

5) That was a proposal submitted by Sam (of Ghana), see A/CONF.97/19, p 431, para.97.

6) Ibid, p 432, para. 104 (Honnold of US).

It would be seen below, however, that where the buyer's breach is actual, the seller is at least entitled to withhold delivery; and to this extent all the laws relevant to this study are in agreement.(7) It has just been indicated, moreover, that such a breach constitutes under the Convention a good ground for concluding that the buyer will commit a breach when his obligation of paying the price falls due.

165. Comparison: ULIS and Convention

The preceding discussion shows some aspects of similarity between ULIS and the Convention without ignoring the fact that there are essential differences between them.

As to form, ULIS uses the word "appears" with respect to the difficulty in the buyer's economic situation and "material" as regards the obligation that will not be performed by the buyer, while the Convention uses the words "it becomes apparent" and "substantial" respectively. In practice, however, it may be difficult to assume that this difference in wording, at least with respect to "substantial" and "material", is likely to give any fruits.(1) Further, the Convention had excluded the several elastic expressions and words used in ULIS; those are "economic situation" "so difficult" "good reason"

164- 7) Post, paras. 168 f.

165- 1) As to the word "material" in ULIS, the W.G. in its 5th session replaced it by "substantial" without giving any reason for that change, see A/CN.9/87, para. 106. As to the other word , see supra, paras. 162 f.

and "to fear". By contrast, the following terms under the former are innovations: "deficiency", "ability" and "credit-worthiness".

As to substance, both are in agreement to the effect that for satisfying the test the relevant question should "appear" or "become apparent" only after concluding the contract. Likewise, the test in both does not necessarily mean that the buyer's(prospective) breach will certainly occur; it is sufficient, in the language of the Convention, that "it is apparent" or, under ULIS, that "there is good reason to fear" that such breach will occur.

There are, on the other hand, notable differences between the two laws. In the first place, what should appear after making the contract is, under ULIS, the economic situation of the buyer which, presumably, must have become, also subsequent to the contract, so difficult; while what should be apparent under the Convention is that the buyer will commit a breach. In the second place, the direct and only cause of the buyer's prospective breach is, under the former, his bad economic situation while the latter has exclusively given four, or more precisely three, events each of which constitutes good reason to conclude that the breach will occur. Thus, the buyer's economic position may be good but his conduct in performing the contract makes it apparent that he will not effect further performances; in this case, the seller is entitled, under the Convention but not ULIS, to suspend the performance of his obligations if, of course, the other conditions of suspension are met. In short, the bad economic situation of the buyer is irrelevant under the Convention except to the extent that it amounts to a serious deficiency in his ability to perform or in his creditworthiness.

166. Material (substantial) obligation

However, not every prospective breach by the buyer justifies the seller's suspension of performance; rather, it must relate, in the words of ULIS, to a "material" or, in the language of the Convention, to a "substantial" part of his obligations. As has just been suggested, this difference appears to be of formal nature and, presumably, no practical benefit could be obtained from it. On the other hand, it is clear that both laws have avoided the usage of the expression "fundamental breach", and this is a main difference between the avoidance on the ground of "anticipatory" breach, where that term has been used,(1) and the remedy of suspension on the ground of "prospective" breach. The practical importance of this difference is quite obvious. The breach may, according to the proper criterion, be fundamental(2) though it does not relate to a substantial or material part of the obligations, and the converse is true. For example, a delay in making part payment for one day may amount to a fundamental breach while such payment may not constitute a substantial part of the obligations. Conversely, a month late in paying the whole price may not amount to fundamental breach although such failure relates, in principle, to a material part of the buyer's obligation. The result of this divergency is quite plain, that is, the court or arbitral tribunal cannot rely on

---

166- 1) Supra, para. 63.
2) On the definition of fundamental breach, see supra, para. 17.

the definition of fundamental breach in ULIS or the Convention[2] to conclude that the prospective breach relates to a material or substantial part of the obligations.

It is assumed, on the other hand, that the phrase "will not perform" used in both laws covers, in addition to the absolute non-payment, the delay in paying the price. Suppose, for instance, that the buyer's country has temporarily imposed exchange control restrictions for a certain period of time; suppose also that the contract has already required the buyer to make payment on a day falling within the same period. If, in this setting, the conditions of the test including the prospective failure to pay exactly on that day are met, then the seller may suspend the performance of his obligations.

Another problem calls for consideration; that is, the meaning of "material or substantial part of obligations" which, unlike the "fundamental breach", has no definition in either ULIS or the Convention; nor does the legislative background of the latter give any guidelines on this problem. As a whole, however, it is true that the importance of any obligation is a matter of degree to be decided by the court in the light of, and with relation to, the other obligations undertaken by the buyer. Nevertheless, it should be emphasized that payment of the price constitutes not only a substantial or material part of the buyer's obligations but also the core of those obligations. So that where the prospective non-payment relates to the whole price, no difficulty may arise in practice. But the problem is more difficult where,

for instance, the buyer has already paid part of the price, or where the contract is by instalments and the prospective breach only relates to one instalment. Whether the remainder in the former constitutes a material or substantial part of the buyer's obligations is again a question of degree where regard may also be given to the part payments already made. As to the latter, the solution depends, as suggested, upon whether payments have already been apportioned to deliveries to the extent that each instalment is to be treated as if it were a separate contract, or not. If so, the importance of each payment is to be estimated in comparison with the buyer's obligations arising from the relevant instalment but not from the contract as a whole; if not, then the converse may be true.

167. Domestic laws

Bearing in mind the above discussion, the doctrine of suspending performance as adopted by ULIS and the Convention has several characteristics distinguishing it from other principles recognized by national laws. Firstly, the doctrine is of general application to the effect that it applies, on the one hand, to the buyer as well as the seller(1) and, on the other, to any obligation undertaken by the aggrieved party. Secondly, its application is confined to situations

---

167- 1) As has been noted, the defence under ULIS is granted to both parties in exactly the same circumstances and with exactly the same effect (Cohn, p 522). See, however, Eörsy, 31 A.J.C.L. 1983, p 333, 335.

in which the other party's breach is prospective. Thirdly, that breach should be material or substantial. Under the Convention, finally, the primary effect of the suspension is that performance should be continued upon providing an adequate assurance by the other party.(2)

This doctrine as such has no counterpart in either English or French Law. It is not the seller's right of lien or of withholding delivery which is well-admitted in these two laws although this right, as far as the aggrieved seller is concerned, is the most important application of the doctrine of suspension; nor are the grounds for suspension similar to those required for withholding delivery.(3) Nor is it comparable to the Civil Law rule "exceptio non adimpleti contractus" which is well-recognized in French Law;(4) in short, the application of this rule presumes that the reciprocal performances in a synallagmatic contract, say delivery and payment, are due; in that case, either party may suspend the performance of his obligation so long as the other party's performance is not yet received.(4)

Indeed, this doctrine has, without distortion, certain perantage in some other domestic laws. Under UCC, for example, s.2-609(1) reads: "A contract for sale imposes an obligation on each party that the other's expectations of receiving due performance will not be impaired. When reasonable grounds for insecurity

---

167- 2) Post, para. 172.
3) See below, para. 168.
4) See generally Carbonnier, para. 84; Marty et Raynaud, paras. 293 ff; Starck, paras. 2193 ff.

arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return."(5)

An analogous provision is likewise found in some other Civil Codes, eg., German Civil Code and Swiss Code of Obligations,(6) where it has been argued that the doctrine of suspension (under ULIS) is more nearly related to those laws(7) than any other law.

168. Grounds for lien: domestic laws

According to s.41(1) of the SGA, the unpaid seller has a right of lien on, or is entitled to withhold delivery(1) of, the goods in the following cases(2):

167- 5) Cf., s.8.7(1) of DUSA which is analogous to that provision.
6) See Treitel, Remedies, s.189; Cohn, passim, who also refers to the Codes of Italy, Austria and the Scandinavian countries. See further ss.213 (general principle) and 363 (withholding delivery) of CITC.
7) Cohn, p 522.

168- 1) According to the Act, the seller's lien is exercised where property of goods has passed to the buyer; but if the property is still vested in the seller, he has a right of withholding delivery similar and co-extensive with his right of lien (s.39.2).
2) It has been held, in this regard, that in the case of an ordinary sale of a commercial article under a commercial agreement, the seller has no lien other than that which =

(a) where the goods have been sold without any stipulation as to credit.

(b) Where the goods have been sold on credit but the term of credit has expired.

(c) Where the buyer becomes insolvent.(3)

Read literally, the second case confers a lien on the seller even where he wrongfully refuses to effect delivery though the buyer may be entitled to claim damages in this event.(4) But it has been suggested that this result is probably not intended and it may be that the seller cannot exercise his right of lien in these circumstances.(5) In brief, however, the seller's lien may be exercised in either of two situations.

The first is where payment is due which is the same in French Law.(6) In this connexion, it may be important to note that Common Law writers are generally in agreement to the effect that granting a credit for payment does not necessarily mean that the seller is bound to make delivery

---

168- =) the Act itself provides, see Transport and General Credit Corporation Ltd. v. Morgan [1939] 2 All E.R. 17, 25.

3) For definition of insolvency, see s.61.4 of the Act.

4) This seems to be the view of Atiyah, p 303; see also Fridman, p 348.

5) See OLRC Report, vol. 2, p 396; see also Baer, p 6; Benjamin, para. 1169 where it has also been suggested that a wrongful refusal by the seller to deliver the goods should debar him from exercising his lien even if the buyer should later become insolvent.

before payment; it may only mean that he does not insist on immediate payment.(7) The result of this suggestion is that the date of delivery is also to be postponed until payment falls due. If, after maturity of payment, the buyer fails to pay, the seller would then be entitled to withhold delivery; and this may be the true construction of section 4(b) above.

The second situation in which the lien may be exercised is the buyer's insolvency (or bankruptcy) notwithstanding the fact that payment is not yet due. An equivalent provision is stated under Article 1613 of French C.C. which also stipulates for withholding delivery that the seller is in imminent danger of losing the price.

Even assuming that the doctrine of suspension is ULIS and the Convention is to be applied to the seller's withholding delivery, the preceding discussion shows, nevertheless, notable differences between English and French Law, on the one hand, and, on the other, the first two laws.

While the "suspension" under ULIS and the Convention only occurs where the buyer's breach is prospective;(8) this is obviously not the case under the <u>first</u> situation of withholding delivery in English or French Law. As to the <u>second</u> situation, it rather faces the case in which time of payment has not yet matured or expired; otherwise, the seller's right to withhold delivery may be based on the first situation where

---

168- 6) Art. 1612 of C.C.; see also s.2-703 of UCC and s.9.8(1) of DUSA.

7) Atiyah, p 303; Benjamin, para. 1164; Fridman, p 348.

8) <u>Supra</u>, para. 164.

the insolvency is irrelevant. In spite of that, it is to be noted that while the buyer's insolvency or bankruptcy is the only ground for withholding delivery under English and French Law, the grounds for "suspension" under ULIS and the Convention are, as has been seen, completely different. Thus, it would not be strange that the buyer's insolvency may not , in certain circumstances, justify the "suspension" while in others such "suspension" may be justified even where the buyer is solvent. Moreover, the insolvency (or bankruptcy) under both English and French Law does not justify withholding delivery unless it occurs after the conclusion of the contract;(9) again, the position of the Convention is quite different where it is sufficient for the "suspension" that the grounds on which it is based become apparent after making the contract even though they already existed at that time.(10)

Two further points must be observed. Firstly, according to the SGA the mere insolvency of the buyer justifies the seller's lien while French C.C. also requires, as has just been seen, that the seller is in imminent danger of losing the price because of the buyer's insolvency (or bankruptcy). Secondly, at Common Law, as has been said,(11) the mere belief of one party (however reasonable) that the other party will not be able to perform his obligations when they fall due is not

---

168- 9) See s.41.1 of the SGA (above) "where the buyer <u>becomes</u> insolvent"; Art.1613 of French C.C.;see further Cohn,p 525.

10) <u>Supra</u>, para. 163. But <u>cf</u>., ULIS, <u>supra</u>, para. 162.

11) Treitel, <u>Remedies</u>, s. 189.

a ground on which refusal to perform can be justified; while the same is also true in French Law, this is of course not the situation in either ULIS or the Convention where the whole doctrine of suspension is based upon the ground of "prospective breach" as described above.

169. Actual breach: ULIS and Convention

So that, where the buyer's breach is actual the seller is entitled in various domestic laws to refrain from effecting delivery until the price is paid. As has been seen, a similar principle applies under ULIS and the Convention as well.(1) Furthermore, where delivery is effected by handing over the goods to a carrier for transmission to the buyer,(2) the seller is entitled under both laws to postpone their despatch until he receives payment.(3) In such a case, however, he may despatch the goods on terms whereby those goods or the documents controlling their disposition will not be handed over to the buyer except against payment of the price.(4) Under ULIS, further, the seller may reserve to himself the right to dispose of the goods during the transit.(4a)

169- 1) Supra, para. 10.
2) By virtue of Arts. 19.2 of ULIS and 31(a) of the Convention.
3) Art.72.1 of ULIS; although an express provision as such is missed under the Convention, it has been suggested that a similar principle applies therein (supra, para. 10).
4) Arts.72.1 of ULIS and 58.1 of the Convention.
4a) Art.72.1 of ULIS.

In this connexion, the following points should be emphasized.

Firstly, no further details concerning the seller's right of withholding delivery could be found under either ULIS or the Convention.(5) Accordingly, it may be that this remedy as a whole is left, at least under the latter, to the law applicable to the contract provided that the general principles on which the Convention is based do not produce the proper solution.(6) This in particular includes the goods that might be affected by withholding delivery, and the case in which the seller loses this right on grounds other than making, or say tendering, payment of the (full) price. Under ULIS, by contrast, reference has only been made to the general principles on which this Law is based.(7)

Secondly, the relationship as between the carrier and either the buyer or the seller, whether before the commencement of the transit or during it or after it terminates, is outside the scope of both ULIS and the Convention where the general principle is that either only governs the obligations (and rights) of the buyer and the seller arising from a contract of sale.(8)

169- 5) There are, however, certain rules under both ULIS and the Convention relating to the effects of withholding delivery (post, paras. 182 ff).

6) Art.7.2 of the Convention.

7) Art.17 of ULIS.

8) Arts.8 of ULIS and 4 of the Convention; as to an exception to this rule under the former, see post, para. 173.

2. Stoppage in transit

170. Texts

Art.73 (paragraphs 2 & 3) of ULIS provides that:-

"2- If the seller has already despatched the goods before the economic situation of the buyer described in paragraph 1 of this Article becomes evident, he may prevent the handing over of the goods to the buyer even if the latter holds a document which entitles him to obtain them".

3- Nevertheless, the seller shall not be entitled to prevent the handing over of the goods if they are claimed by a third person who is a lawful holder of a document which entitles him to obtain the goods, unless the documents contains a reservation concerning the effects of its transfer or unless the seller can prove that the holder of the document, when he acquired it, knowingly acted to the detriment of the seller".

While Art.71.2 of the Convention[1] provides that:-

"If the seller has already desptached the goods before the grounds described in the preceding paragraph become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. The present paragraph relates only to the rights in the goods as between the buyer and the seller".

170- 1) For a legislative background of the text, see the documents cited in para.161, note 1.

171. Concept of stoppage

Stoppage of goods in transit is a real remedy given to the seller and, so far as ULIS and the Convention are concerned, no corresponding right has been granted to the buyer.(1) In general, this remedy is recognized by various legal systems(2) including Common(3) and Civil Law although the grounds entitling the exercise of this right may vary from one legal system to another. However, the doctrine is based, in domestic laws, upon two main factors: the location of the goods sold and the financial position of the buyer.(4)

The first factor presumes that the goods have already been desptached to the buyer but have not yet reached him; or, in the words of the SGA, that the seller has parted with the possession of the goods but they are still in course of transit.(5) A similar requirement could easily be inferred from the foregoing provisions of both ULIS and the Convention.(6)

171- 1) It was suggested, while preparing the draft convention, to extend to the buyer a right to prevent the payment of the money parallel to the seller's right of stoppage, but that suggestion had been rejected, see A/32/17, annex I, paras. 412 ff.

2) See in detail A/CN.9/131, annex, s.2.4.3 in which very many domestic laws have been referred to.

3) For reported cases prior to the Act, see Benjamin, para. 1191. And for other Common Law countries, see e.g., ss.2-705 of UCC & 9.9 of DUSA.

4) A/CN.9/131, ibid, s.2.4.3.1.

5) S.44.1 of the Act.

The second factor shows a marked difference between national laws; while some of them, eg., French Law, require the buyer's bankruptcy,(7) his insolvency is sufficient under others(8) and this is the clear position of the SGA.(9) The approach of both ULIS and the Convention in respect of this factor is, as will be seen below, completely different.

If, however, these requirements are met, then national laws are in agreement to the effect that the seller is entitled to prevent delivery of the goods to the buyer whereupon he can regain possession of them.(10) A seller who stops the goods in transit would have a priority in respect of those goods over the general creditors of the buyer,(11) and this appears to be the main purpose of the doctrine of stoppage(12)

171- 6) And CITC too (s.346.1). See further para.172, below.

7) A/CN.9/131, ibid; but it must be noted that the seller's right to regain possession (from a carrier) in French Law seems to be regarded as an extension of his lien rather than a right separate from it (Mazeaud, vol.3, t.1, para. 192).

8) It may be interesting to mention that in English Law, the insolvency, strictly speaking, refers to the state of indebtedness where the debtor is no longer able to pay his debts as they fall due, while the bankruptcy is the name given to the form of proceedings whereby a debtor who has committed certain acts and defaults is divested of his property to be equitably distributed among his creditors according to statutory priorities. Whereas insolvency is a matter of fact, bankruptcy denotes the status of a person and is a question of law, (see Spatt & McKenzie's Law of Insolvency, 2nd ed. 1972, s.0/4). In French Law, on the other hand, the proceedings of bankruptcy apply only-

Although the seller's right of stoppage is likewise admitted in international trade, it has justly been noticed that this remedy has lost much of its practical importance;(13) this is due to the fact that payment against documents especially that which is made by a letter of credit is the most usual method of payment prevailing in international trade nowadays. In these circumstances, the seller remains holding the documents controlling the disposition of the goods until he is paid.

Finally, it will be noted that most of the main questions concerning the doctrine of stoppage are not governed by either ULIS or the Convention and, therefore, are subject to the proper law of the contract. Of course, it is outside the scope of the current study to dwell upon national laws except to the extent necessary for comparing them with ULIS and the Convention.

171- =) to merchants and commercial companies, while insolvency is a matter of civil law and, accordingly, its rules apply only to "société civile", i.e., to non-merchants, (Amos & Walton's Introduction to French Law, 3rd ed. 1967, p 370).

9) S.44 of the Act; and for a definition of insolvency, see s.61.4 of the Act. Cf., ss.2-705(1) of UCC and 9.9(1) of DUSA where under both the right of stoppage covers other situations, e.g., the buyer's repudiation.

10) But some countries, as has been said, allow the trustee in bankruptcy to object to the seller's repossession, see A/CN.9/131, s.2.4.3.2.

11) Ibid, s.2.4.3.5.

12) Benjamin, para. 1192.

172. Grounds for breach

So that, ULIS and the Convention are in agreement with national laws in relation to the first condition of exercising the right of stoppage in transit; that is to say, that the goods have been despatched to the buyer but have not yet been handed over to him. However, the same grounds for suspension in general as described above apply to the right of stoppage and there is no need to repeat the discussion.(1) But it is important in this connexion to bear in mind two facts.

Firstly, in giving the seller the right of stoppage, neither ULIS nor the Convention has drawn a distinction between non-payment of the price and other (prospective) breaches by the buyer. It follows that the former can stop the goods in transit even if, strictly speaking, the buyer has paid the whole price.(1a) To illustrate, suppose under the Convention that a contract calls upon the seller to effect three deliveries as follows: the first is fob or cif; the second, which is to be made immediately after the first, is ex-works; and the third, which covers the great part of the goods, is also ex-works. Suppose too that after

---

171-13) Atiyah, p 310; Benjamin, ibid; OLRC Report, vol. 2, p 401; A/CN.9/131, s.2.4.3.4.

172- 1) See supra, paras. 162 f. Cf., Berman, 30 L. and Con. Prob. 1965, p 354, 357.

1a) Cf., draft ULIS (1956) which restricted both the suspension in general and stoppage in particular to the buyer's failure of payment of the price (arts.82, 83).

despatching the first instalment but before handing it over to the buyer, the latter has failed to take delivery of the second instalment. In this setting, the key question is: could the seller turn on such failure for stopping the first instalment in transit? If strictly applied, the relevant provision under the Convention would give a positive answer provided that it is apparent from the buyer's failure that he will not take delivery of the third instalment, and such (prospective)breach relates to a substantial part of his obligations. Whether this odd result is intended is very doubtful where there is no rational justification for applying the doctrine of stoppage in these circumstances; and it is doubtful, moreover, that any of the domestic laws adopting this doctrine follows this approach. Under the SGA, however,the right of stoppage is only given to the unpaid seller[2] in the meaning referred to above.[3]

Secondly, the grounds for stoppage should become "evident"[4] only after despatching the goods and this, moreover, suffices.[5] So, for instance, if such grounds were

---

172- 2) In accordance with s.44 of the Act; see also ss.364, 363 of CITC

3) Supra, para. 2.

4) It has been pointed out that under the Convention Art.71.1 (the general principle of suspension) uses the word "apparent", Art.71.2 (stoppage in transit) uses the word "evident" and art.72 (anticipatory breach) uses the word "clear" though no difference could be seen in the ideas which these words seek to convey; see A/CONF.97/19, p 433, para. 21 (Khoo of Singapore); that was also the opinion of Rognlien of Norway (ibid, para. 22); see further p 218, para. 44 (Krisbis of Greece) ibid.

"apparent", "evident" or the like[4] before the despatch and the seller nevertheless despatched the goods he could not exercise the right of stoppage. Conversely, where those grounds existed before the despatch but they became evident only after that time, the stoppage would be justified. Under the SGA, by contrast, it seems that the buyer's insolvency (or bankruptcy), which is the only ground for the stoppage,[6] does not justify the exercise of this right unless it occurs during the transit.[7] Prior to the Act, however, it was held that it was not necessary that the buyer should be actually insolvent at the time of exercising the stoppage; if the insolvency happened before the arrival, it would be sufficient.[8]

172- 5) Which is similar to the approach of CITC (s.364.1) "If the seller learns of a circumstance entitling him to postpone the delivery of the goods only after the despatch of such goods...".

6) S.44 of the Act. cf.; s.2-705(1) of UCC and s.9.9(1) of DUSA where both provide for other reasons justifying the stoppage including the buyer's repudiation.

7) See Benjamin, particularly paras.1132,1192; cf., Cohn, p 532, who considers that it does not matter whether the insolvency arose before or after the goods were despatched.

8) The Constantina (1807) 6 C.Rob. 321, 326; (165) E.R. 947, 950. And it has been suggested in this regard that it is possible to interpret s.44 of the Act so as to enable a retroactive justification of a premature stoppage, in line with the previous Common Law (Benjamin, para. 1156).

173. Third parties' rights

It is important to note, first of all, that the mere fact that the buyer holds a document representing the goods, e.g., a bill of lading which entitles him to obtain the goods, does not deprive the seller of his right to stop the goods in transit.(1) This provision in both ULIS and the Convention is in line with English Law.(2)

However, the Convention expressly states that the provision dealing with the stoppage in transit relates only to the rights in the goods as between the buyer and the seller. Thus, any relationship between either of these two parties and any other person, e.g., a carrier, bailee or a person to whom the bill of lading has been indorsed is outside the scope of the Convention. But this rule, as has rightly been observed, adds nothing to the general rule stated in Art. 4 to the effect that the Convention as a whole governs only the rights and obligations of the buyer and the seller.(3) Although Art.8 of ULIS contains a similar general rule, there is an important exception to this rule with relation to the seller's right of stoppage in transit. In this regard, it

---

173- 1) Which is the same under CITC (s.364.1). Cf., s.2-705(2)d of UCC and s.9.9(2)d of DUSA where in both the seller loses his right of stoppage if a negotiable document of title has been negotiated to the buyer.

2) This could be inferred, as has been noticed, from s.47 of the SGA (Atiyah, p 314). As to examples from the case law, see Ex. p. Golding Davis and Co. Ltd. (1880)13 Ch.D.628, 633; Schotsmans v. Lancashire and Yorkshire Railway(1867) =

provides for a principle and two exceptions.

The principle is that "the seller shall not be entitled to prevent the handing over of the goods if they are claimed by a third person who is a lawful holder of a document which entitles him to obtain the goods".(4) An obvious illustration of this is the case in which the buyer, who holds a (negotiable) bill of lading representing the goods, endorses it to a sub-buyer. In such an event, the seller loses his right of stoppage; an equivalent provision is stated under s.47.2 of the SGA.

The language of ULIS is not free from criticism nor from difficulties in practice. In addition that the phrase "lawful holder" in particular is likely to be interpreted in different ways,(5) the provision as such raises two main questions.

In the first place, it fails to make a distinction between a holder of a document for value and that who holds it for nothing though such a distinction appears to be very

---

173- =) L.R.2 Ch.App. 332, 337; The Tigress (1863) 32 L.J. Adm.97.

3) A/CN.9/125 and Add 1-3 (Finland, para.14).

4) As has been suggested the expression "third person" excludes any person who might be authorized to obtain the goods on behalf of the buyer, see Cohn, p 537.

5) See, however, the comment of Cohn on this term, p 536 where he suggests that article 16 of the Geneva Convention on Bills of Exchange of 1932, from which the term "lawful holder" has been borrowed, and such authorities as are available for its interpretation will have to be considered in interpreting this term.

important. In the former, it may be rational and fair as well to protect the holder of the document while such protection is indeed difficult to be justified in the latter situation where the holder loses nothing in giving the seller a priority over him. And that is why the approach of the SGA is, as submitted, preferable; by virtue of s.47.1 of the Act, the third person who holds a document of title to the goods is protected as against the seller only when he "takes it ... for valuable consideration";(6) otherwise, the seller is not deprived of his right of stoppage.

In the second place, a literal reading of the above provision may, in certain events, lead to unjust results. For example, a bill of lading may be transferred to a third person by a way of pledge, but the value of the goods may exceed the amount of his loan. In this setting, it may be sound to protect the holder by giving him a priority over the seller but not by depriving the latter of any right in respect of the goods, which is literally the situation under ULIS. So that, it would seem likely had ULIS made the seller's right of stoppage subject to the third person's right; and in doing so, it would achieve the protection intended for both parties: the latter by giving him priority over the former, and the former, as against the general creditors of the buyer, by granting him a right only to the surplus of the proceeds of

---

173- 6) Which also includes past consideration, see eg., Leask v. Scott Brothers (1877) 2 Q.B.D. 376.

the goods. This is, again, the proper solution as produced by the SGA.(7)

The first exception to this rule is where the document contains a reservation concerning the effects of its transfer, such as the phrase "negotiable subject to the seller's right" or "not free from the seller's right". But, as has been observed, such reservations seem to be very rare in practice.(8) The second is where the "seller can prove that the holder of the document, when he acquired it, knowingly acted to the detriment of the seller".(9) It follows that the crucial question for defeating the holder's right is not whether he has actually known, when obtaining the document, of the seller's right, but rather whether he has knowingly (or intentionally) obtained it to the detriment of the latter.(10) The burden of proving this fact is rested with the seller. This is clearly a serious charge; nevertheless, it may be justified by the fact that there is a real need to ensure the widest possible unimpeded negotiability of bills. Accordingly, personal defences to actions of bills must be restricted as far as possible.(11) Although under s.47.2 of the SGA the holder of a document is not protected as against the seller unless he takes it in good faith, it appears that this

---

173- 7) S.47.2(b) of the Act.

8) A/CN.9/131, s.2.4.3.3.

9 This phrase seems to have been derived, again, from Art.17 of Geneva Convention on Bills of Exchange; for interpreting it under this Convention, see Giles, Uniform Commercial Law, 1970, pp 166 ff.

requirement is substantially different from the foregoing exception under ULIS. By virtue of s.61.3 of the Act, a thing is done in good faith when it is in fact done honestly, whether it is done negligently or not. So that, fraud is certainly inconsistent with good faith(12) and "if it be proved", as has been held, "the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or to injure the person to whom the statement was made".(13)

Finally, another notable difference between the Act and ULIS calls for consideration. Under s.47.2 of the former, the holder of the document is not protected as against the seller unless that document has been lawfully transferred to the original purchaser who has then transferred it to a third person. So that the sub-section does not apply to the following cases:

1. Where the (original) purchaser has unlawfully obtained the document.
2. Where that purchaser has transferred to the sub-purchaser a document other than that which has been transferred to him.(14)

173- 10) Cf., s.364.2 of CITC under which the seller is entitled to stop the goods in transit if the third party obtaining the document "knew or ought to have known that the seller would suffer a damage as a result of the transfer of the goods".

11) See Giles, ibid, p 166.

12) See Schmitthoff, Sale of Goods, p 220.

13) Derry (William) v. Peek (1889)14 App. Cas. 337. 374.

But under ULIS these two matters are immaterial for applying the relevant text where the conditions of its application referred to above are completely different.

174. Concession to national laws

No more details concerning the seller's right of stoppage in transit have been given by either ULIS or the Convention. The result is of course obvious at least with relation to the latter; any other question is to be solved in accordance with the proper law of the contract provided that the general principles on which the Convention is based don't produce the appropriate solution.(1) This is not the situation under ULIS which excludes the application of domestic laws so long as the question concerned is governed by the Law but not expressly settled therein; in such a case, reference is to be made only to the general principles on which ULIS is based.(2) Appart from its difficulties,(3) this statement does not of course ignore the fact that ULIS governs, as a general rule, only the contractual relationship between the buyer and the seller.(4) Thus, except the case in which there is a third person holding a document entitling him to obtain the goods, which has just been considered, any

---

173- 14) Mount (D.F.) Ltd. v. Jay and Jay (Provisions) Co. Ltd. [1960] 1 Q.B. 159.

174- 1) By virtue of Art.7.2 of the Convention.

2) Art. 17 of ULIS.

3) See Honnold, Uniform Law, para. 96.

4) Supra, paras. 169, 173.

relationship between either the seller or the buyer and any other person is outside the scope of ULIS. This in particular includes the relationship between the seller and the carrier who holds the goods during the transit.(5) In this connexion, it may be interesting to note that domestic laws which adopt the doctrine of stoppage are generally in agreement at least in respect of two important points.(6) The first is that the carrier is under a duty to comply with the seller's order of stoppage after ascertaining that its conditions are met. The second is that the latter is entitled, as a rule, to retain the possession of the goods. These two principles are likewise expressed by the SGA.(7)

However, the thorny difficulty which may arise here

174- 5) See, however, A/CN.9/87, annex 4, para.60 where it has been said that notwithstaning the fact that ULIS only governs, as a rule, the obligations of the seller and the buyer arising from a contract of sale (Art.8, supra,paras. 169, 173), a wider scope for article 73 seems to be implied from para.2 and, more particularly, from the provision in para. 3 (both are concerned with stoppage in transit). And this has already expressed the concern over the liability which these provisions may inflict on carriers.

6) See A/CN.9/131, annex , s.2.4.3.5.

7) S.46.4 of the Act; see also ss.2-705(3) of UCC and 9.9(8) of DUSA.Cf., Kopac in his comment on s.364 of CITC (p 124) where it is considered that it will depend on the legal relation, existing between the person who holds the goods and the buyer, whether the former will be bound to comply with the seller's demand.

relates to the situation in which the proper law of the contract, on the assumption that its application to the right of stoppage as such is inevitable, does not recognize this right. Of course, this problem is not confined to the stoppage in transit; it has already been considered that it may also arise in respect of the question of interest and, therefore, the same suggestion given there may be adopted here.(8) That is to say, that the rules of private international law may suggest an alternative law recognizing the doctrine of stoppage whether or not it would be the law of forum; otherwise, the court may, as a last resort, apply any other domestic law recognizing this doctrine and, presumably, its choice would be reasonable in the circumstances.

175. Difficulties of interpretation

Apart from the recourse to national laws, the provisions of stoppage as adopted by ULIS and the Convention are not free from difficulties of interpretation in practice. For example,(1) both refer to the fact that the right of stoppage may be exercised after the despatch of the goods, and to the seller's right to prevent the handing over of the goods. The question is therefore concerned with the meaning of the underlined expressions.(2)

174- 8) Supra, para. 136.

175- 1) See also supra, para. 173 and note 5 therin.

2) In this respect, Art.7.1 of the Convention provides that: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."

As to the term "despatch", it may be interesting to point out that the comment of the S.G. on the relevant text of the draft convention refers to the seller who has "shipped" the goods; in that case, he is entitled to order the "carrier" not to hand over the goods to the buyer.(3) This might suggest that the term "despatch" would rather refer to the (actual) beginning of any transportation than to "parting with possession" of goods by the seller. As regards ULIS, such suggestion has clearly been supported by another view on the ground that any enterprise which has its own fleet (of lorries) on which the goods are shipped would not be in a better position than the small man who has to use a carrier and cannot retain goods, once the despatch has started, if by that time the buyer's precarious situation was already evident.(4)

Nevertheless, this view raises the question as to the position of the seller after he has parted with possession but before the (actual) despatch starts; during this period, the goods may be in the custody of a person who is even independant from either the seller or the carrier. In such a case, it may be unsound to prevent the seller from exercising the stoppage though the goods are at hand whereas he is entitled to do so while they are afloat. Furthermore, it may be that the doctrine of stoppage (always) presupposes that

---

175- =) good faith in international trade".

3) A/CN.9/116, annex 2, comment on art.47, para.6; A/CONF.97/5, comment on art.62, para. 10.

4) Cohn, pp 533 f.

the goods are in the possession of a neutral middleman who is independant from either the seller or the buyer; this is at least the obvious position of Common Law countries in which the doctrine is well-established.(5) Accordingly, shipping the goods on the seller's means of transportation may not be regarded, it is suggested, as a "despatch" in the sense intended by this term under ULIS or the Convention. The result is that he can prevent the handing over of the goods to the buyer not on the ground of the principle of stoppage, but rather in accordance with the doctrine of suspension in general. In brief, the term "despatch" in both laws refers, as submitted, to the case in which the seller, in performing his obligation of delivery, has parted with the possession of the goods to some third person who holds them on his own behalf.

As to the term "handing over" of the goods, which clearly relates to the situation in which the transit terminates, it is important to recall that the mere handing over of documents representing the goods does not end the transit.(6) On the other hand, where the carrier physically delivers the (whole) goods to the buyer (or his agent) at the place of destination, this is by all means a "handing over" of the

---

175- 5) See e.g., Gibson v. Carruthers (1841) 8 M and W 321, 328; (151) E.R. 1061, 1064. The approach of the SGA appears to be quite the same (s.45); see further Atiyah, pp 310 f; Benjamin, para.1196; Fridman, p 357; Schmitthoff, Sale of Goods, p 160.

6) Supra, para. 173.

goods. Between these two edges, however, the difficulties lie where there are other events which are likely to take place in practice, and the key question is therefore whether the term "handing over" covers them or not. Several examples of this may be borrowed from the SGA, such as the carrier's attornement to the buyer, part delivery of goods effected by the carrier, the carrier's (wrongful) refusal to deliver or the buyer's rejection of goods while the carrier continues in possession of them.(7) In these cases or the like, one may even suggest that this is not a matter of interpreting the term "handing over", but rather a question relating to whether the transit is at an end on a ground other the "handing over" of the (whole) goods to the buyer, which strictly means physical delivery of them and, accordingly, it would be subject to the law applicable to the contract.

175- 7) S.45 of the Act.

Section II

Effects of Suspension

1. In case of prospective breach

176. Generally

Art 71.3 of the Convention provides that:

"A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party and must continue with performance if the other party provides adequate assurance of his performance."(1)

Although ULIS does not contain any provision concerning the effects of suspending performance by the (unpaid)seller, the following points, which are, as submitted, agreed upon by both laws should be emphasized.

First, the suspension is a temporary remedy(2) where it must ultimately be terminated either by continuing performance or, on the contrary, by avoiding the contract.

Secondly, in suspending performance, which is presumed to be justified, the seller will not be in breach and, therefore, the buyer cannot resort to any remedy on the ground of such suspension.

176- 1) For a legislative background of the text, see the documents cited in para. 154, note 1, supra.

2) See also Cohn, p 528; A/CONF.97/5, comment on art.62, para. 14.

Thirdly, the suspension does not accelerate payment. But it is granted that the seller must continue with performance if the buyer tenders the price; otherwise he would be in breach.

Finally, the suspension would not be justified where payment has already been secured by an assurance by the seller; this is necessarily so because the grounds upon which the whole remedy is based disappear so long as the security exists.

177. Obligations suspended

So the seller is allowed under both ULIS and the Convention to suspend the performance of his obligations if the criterion discussed above is met; and this includes, as suggested, any obligation imposed upon him[1] whether it is to be performed before delivery or even after the goods have actually been received by the buyer. For example, the subject-matter of the goods may be a machine to be manufactured by the seller[2] who undertakes: firstly, to allow the buyer to make the acceptance tests at his works before effecting delivery;[3] and, secondly, to provide the buyer in due course after delivery with drawings and experts necessary for putting the machine into operation.[4] In this setting, the doctrine of suspension applies to both obligations as well as to delivery.

177- 1) Cf., ss.2-609(1) and 8.7(1) of DUSA: the innocent party may suspend "any performance for which he has not received the agreed return"; cf., also supra, para. 172, note 1a.

2) In this respect, it may be interesting to note that by virtue of Arts.6 of ULIS and 3.1 of the Convention any =

It has been suggested, further, that the doctrine dispenses the aggrieved seller from his obligation to prepare for performance.(5) This is thoroughly true when the preparation is regarded as an obligation imposed on the seller. For example, the contract may provide for packing the goods in a specific manner to be checked by the buyer (before delivery); or that the goods are to be manufactured in successive stages where each stage is to be inspected and approved separately. In these circumstances, it is admitted that the seller is entitled to stop the preparation upon the buyer's prospective breach. But such preparation may be the seller's own business rather than a duty imposed upon him; in such an event, it is submitted that the doctrine does not apply.(6) The relevant provisions of both ULIS and the Convention appear to be quite clear to this effect; that is to say that the obligations in the legal sense are the only area in which the doctrine operates. Of course, it is not possible to talk about the suspension of any obligation without assuming in advance that this obligation has already matured.

177- =) contract for the supply of the goods shall not be considered sale where the party who orders the goods undertakes to supply an essential (and, under ULIS, substantial) part of the materials necessary for such manufacture.

3) Which appears to be familiar in international contracts; see, e.g., the ECE General Conditions for the Supply of Plant and Machinary for Export (s.5 of nos.188,574); see also s.8.3 of nos.188A and 574A (General Conditions for the Supply and Erection of Plant and Machinary for Import and Export).

178. Goods involved

Where the suspension relates to withholding delivery or to stoppage in transit, it is important to determine the goods affected by exercising either of these two rights. In this connexion, it may be that the criterion for suspension is generally easy to apply. In brief, the seller is entitled to withhold delivery of the whole goods or any part of them not yet despatched; and the same is true with respect to the right of stoppage after the despatch but before the transit terminates. This principle, which has no exception whatever, applies even where the contract is by instalments or where there are more than one contract of sale entered into between the same buyer and seller. In the latter situation, however, it may well be that the seller cannot rely on the buyer's prospective non-payment for one contract to withhold delivery of (or to stop in transit) any goods under another contract which has already been performed by the buyer.(1) In fact,

---

177- 4) Again, it is noteworthy that the Convention, according to Art.3.2, "does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists of the supply of labour or other services".

5) A/CN.9/116, annex 2, comment on art.47, para 8; A/CONF. 97/5, comment on art.62, para. 8. A similar rule seems to be applied in English Law, see H. Longbottom and Co. Ltd. v. Bass, Walker and Co. [1922] W.N.245.

6) But see Cohn, p 527.

178- 1) The general rule under CITC is expressly the same (s.213); but cf., s.363.2 which entitles the seller to withhold delivery if the buyer is in delay in paying the purchase =

this is not an exception to the general principle but rather an application of it since no (prospective) breach is likely to occur in respect of that contract.

To illustrate, suppose that the same buyer and seller have entered into three separate contracts; suppose also that the former has paid the whole price for the goods under one of them. In this case, the seller may be entitled to withhold delivery of goods covered by the other two contracts but not by that which has been performed.

It is to be noted that a similar approach is followed under English Law.(2)

Likewise, payments under an instalment contract may, according to the true construction of it, be apportioned to deliveries to the extent that each delivery is to be treated as if it were a separate contract. In these circumstances, it is suggested that the seller is not entitled to withhold delivery of any instalment or to stop it in transit on the ground of prospective non-payment for other deliveries if payment for that instalment has already been made. In English Law, where there is a contract providing for several payments for several portions of goods in the sense that the contract is apportioned, the seller cannot exercise his lien in respect of the goods which has actually been paid for.(3) If, however, the contract is indivisible, the seller is not bound (upon

---

178- =) price for other goods delivered by the seller; see also Kopac in his comment on both sections, pp 73, 123.

2) See Atiyah, p 302; see also the case cited in the next note.

the buyer's insolvency) to deliver any more goods until he is paid the price due for those already delivered as well as for those still to be delivered.(4)

179. Notice by seller

The seller who suspends performance is obliged, under the Convention, to give the buyer an immediate(1) notice of the suspension. No similar provision could be found in either English Law (in respect of withholding delivery or of stoppage in transit) or in ULIS. But it has rightly been observed that ULIS contains a very large number of cases in which notice by one party to the other is required;(2) and this may lead to the conclusion that giving a notice in each case the contractual relationship is affected is one aspect of the general principles on which this Law is based.(3)

As to both the risk of transmission and form, the notice is subject to the general rules. So that the risk, according to the despatch theory, is to be born by the buyer;(4) and no

---

178- 3) Merchant Banking Co. of London v. Phoenix Bessemer Steel Co. (1877) 5 Ch. D 205, 219.

4) Ex. p. Chalmers. In re Edwards (1873)8 Ch. App. 289,291.

179- 1) In an earlier stage of drafting the text, the notice was to be given "promptly"which had then been replaced by "immediately" without giving any reason justifying that change, see A/CN.9/100, para. 101.

2) For a complete list of provisions under which notices are required, see Graveson and Cohn, pp 30-41.

3) Cohn, 23 ICLQ 1974, p 527.

4) Supra, para. 59.

particular form is required in the notice.(5) On the other hand, the Convention does not require that the notice must contain a particular statement other than that performance has been suspended. It is assumed, nevertheless, that the seller should at least mention, even in a general form, the grounds on which the suspension is based. This statement is of particular importance for both the buyer, who has the right to know why the seller does not perform his obligations, and the court which would ascertain whether or not the suspension was justified. Otherwise, each party may refrain from performing his part of the contract and subsequently he would attempt to find an excuse for his non-performance.

However, the significance of such notice in practice is quite plain; it informs the buyer that the performance he expects to receive is suspended and this is of course better than leaving him in mid-air. In addition, it gives him the opportunity to provide an adequate assurance and in doing so, he would certainly avoid other consequences which are likely to occur such as the avoidance of the contract. In any case, the seller is bound to give such notice and this is a main difference between the effects of "anticipatory" and "prospective"(6) breach where in the former situation he is not bound to give the notice except if "time allows" that.(7)

179- 5) Supra, para. 58; cf., ss.2-609(1) of UCC and 8.7(1) of DUSA where a written notice is required. But a telephone call may not constitute a valid notice if the buyer is unable to understand sufficiently the language of the seller (supra, para. 53, note 2).

180. Adequate assurance

The main effect of the doctrine of suspension is that the buyer can terminate such suspension by providing an adequate assurance guaranteeing his performance when it falls due. Once again, no similar provision exists under ULIS;[1] but since the seller's suspension is based on the fear that the buyer will not perform,[2] it may well be that such fear will no longer be justified where the buyer provides an adequate assurance of performance.[3]

The notion of assurance is not known in English Law;[4] therefore, it may be that the seller's lien does not cease to exist on the ground that the buyer has offered him an assurance securing payment; nor does such fact exclude or terminate the seller's right of stopping the goods in transit. And this seems to be the position of the SGA under which the providing of an assurance is not recognized as a reason justifying the termination of the lien or stoppage.

This notion, however, is well-admitted in several domestic laws including French Law and UCC.[5] By virtue of Article 1613 of French C.C. the seller is no longer bound to make

---

179- 6) Supra, para. 163.
7) Supra, para. 67.

180- 1) Cf., art.82 of draft ULIS (1956) which provided for an "adequate security for payment".
2) Supra, para. 162.
3) Cohn, p 529.
4) Supra, para. 63.
5) See also s.210 of CITC; s.8.7(1) of DUSA; Article 321 of German C.C. (Treitel, Remedies, s.189).

delivery if the buyer becomes insolvent or bankrupt unless the latter gives him security for paying in time. Similarly, under s.2-609(1) of UCC the seller's suspension of performance may continue until he receives adequate assurance of due performance by the buyer; the Code also adds that such assurance should be given within a reasonable time not exceeding thirty days after receipt of the seller's demand.

On the other hand, the Convention does not give any guidelines as to what may constitute adequate assurance, and a suggestion to add examples to the text such as "guarantee" or "documentary credit" was expressly rejected.(6) So it seems that the question has intentionally been left open to be decided in each case in the light of its own circumstances.(7) As has already been indicated, good faith, trade-usage and previous course of dealing between the parties may play a great role in solving this problem.(8) Regard may also be given to the nature of the insecurity and the reputation of the parties; thus, the adequacy of the assurance may, at one extreme, be satisfied by a simple letter stating an intention to perform, and, at the other extreme may require posting of a guaranty.(9) In this connexion, it may be useful to mention that some domestic codes give examples as to what

---

180- 6) A/CONF.97/19, pp 62 (para. 7), 376 (paras. 72-80); see also A/CN.9/87, annex 4, para. 58, and paras. 92, 98 of the original document.

7) See also A/32/17, annex 1, para.417.

8) Supra, para. 67.

9) Calamari and Perillo, s.11.30 (p 439); see also Official Comment 3 on s.2-609 of UCC.

may constitute adequate assurance; this includes a report, opinion, explanation, an affirmation of due performance;(10) mortgage, suretyship, guarantee by assignment or any other sufficient security agreed upon between the parties.(11)

It follows that neither the seller is entitled to demand nor the buyer is bound to offer any assurance more than what is adequate or say reasonable in the circumstances. For example, the seller's demand of real estate mortgage in the buyer's country, especially where that country forbids foreigners from having such right, would be considered unreasonable; on the contrary, the buyer's offer of a guaranty by a reputable bank would mostly be deemed reasonable.

Finally, it is granted that the application of the doctrine of suspension in the Convention (and ULIS) always presumes that there is still at least one obligation undertaken by the seller but not yet performed. If, therefore, he has performed all his obligations, his right of demanding assurance of performance does not exist any more.(12)

181. No avoidance

Art. 71.3 of the Convention in its current form does not entitle the seller to avoid the contract even if the buyer has

---

180- 10) S.8.7(5) of DUSA.

11) S.210 of CITC.

12) Cf., OLRC Report, vol. 2, p 530 where the Commission recommended that the relevant text of DUSA should not be expressly restricted to cases where the person seeking =

expressly refused to provide assurance of his performance.(1) Indeed, the situation under the draft convention as adopted by Working Group was different where a particular reference was made to the aggrieved party's right to resort to avoidance if the other failed to provide the assurance within a reasonable time after he had received the notice of suspension.(2) But such reference was deleted by UNCITRAL on the ground that avoidance in these circumstances should only be based on the test given for the anticipatory breach(3) which has already been discussed in this study.(4) And this was also the general trend of the Conference where a proposal to recur to the Working Group text had been rejected.(5) Thus, the seller's right of avoidance may be exercised as follows:-

1. Where payment becomes mature during the suspension of performance, avoidance may be based upon either the fundamental breach(6) or the additional time notice.(7)

180- =) adequate assurance of performance had not performed his obligations under the contract.

181- 1) Cf., s.213 of CITC under which the aggrieved party is entitled in that case to "repudiate the contract", i.e., avoid it. In both UCC (s.2-609.4) and DUSA (s.8-7.3) the failure to provide the assurance is regarded as a repudiation of the contract; the result of which is that the aggrieved party is entitled to resort to avoidance.

2) A/CN.9/116, annex 1, art.47.3.

3) A/32/17, annex 1, paras. 416-418.

4) Supra, Ch., I, s.IV.1.

5) A/CONF.97/19, pp 129, 377 f.

6) Supra, Ch.I, s.I.

7) Supra, Ch.I, s.II

2. Where, on the contrary, the breach is anticipatory, the avoidance may only be turned on whether it is "clear" that the buyer will commit a "fundamental breach" of contract.(8) But the buyer's refusal to provide the assurance would mostly strengthen the seller's position; and this may therefore make it clear that he will commit a fundamental breach.(9)

2. Preservation of goods

182. Seller's duty to preserve

Art. 91 of ULIS provides that:

"Where the buyer is in delay in taking delivery of the goods or in paying the price, the seller shall take reasonable steps to preserve the goods; he shall have the right to retain them until he has been reimbursed his reasonable expenses by the buyer".

While Art. 85 of the Convention provides that:

"If the buyer is in delay in taking delivery of the goods or, where payment of the price and delivery of the goods are to be made concurrently, if he fails to pay the price, and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps

---

181- 8) According to Art.72.1 of the Convention and Art.76 of ULIS (supra, para. 60). See also A/CONF.97/5, comment on art. 62, para. 15.

9) See also Honnold, Uniform Law, para. 394.

as are reasonable in the circumstances to preserve them. He is entitled to retain them until he has been reimbursed his reasonable expenses by the buyer".(1)

These provisions apply where the seller withholds delivery of goods in consequence of the buyer's actual breach.(1a) In that case, the former is under a duty to take, in the language of ULIS, reasonable steps, or, in the language of the Convention, such steps which are reasonable in the circumstances to preserve the goods.(2)

In fulfilling this duty, the seller is entitled to deposit the goods in a warehouse of a third person at the expenses of the buyer provided that the expense incurred is not unreasonable;(3) this suggests that the seller would bear any expenses exceeding what is reasonable in the circumstances. Further, the warehouse must be appropriate for the storage of goods of the type in question.(4) Once again, neither ULIS nor the Convention governs the relationship as between the third person, say a bailee, and the seller(5) who, however,

---

182- 1) For a legislative background of the text, see the following documents successively: A/CN.9/87, paras. 202 ff; A/CN.9/100, annex 1, art.61(91); A/CN.9/116, annex 1, art. 60; A/32/17, annex 1, paras. 514 f, and para. 35 of the original document (art.60); A/33/17, para. 28 (art. 74). A/CONF.97/19, pp 139 (art.74), 398 (paras. 79 ff) and 227 (para. 36).

1a) See supra, paras. 10, 169.

2) See also s.367 of CITC under which the seller "shall ... arrange for the safe storage of the goods at the risks and costs of the buyer".

3) Art.93 of ULIS; Art.87 of the Convention.

is not acting for the buyer(6) but rather on his own behalf. Anyway, this provision seems to be superfluous and thus there is no need for it.

On the other hand, it is to be noted that the obligation to preserve the goods presupposes that the contractual relationship between the buyer and the seller is still alive.(7) If, therefore, the contract is avoided, this obligation does not exist. Nevertheless, the seller's duty to mitigate his damages(8) may require him to preserve the goods; otherwise, any loss resulting from his failure to do so may not be recovered from the buyer.

Three further points are important to be observed.

Firstly, unlike ULIS and the Convention, English Law does not place a positive duty on the seller to preserve the goods.(9)

Secondly, the language of the Convention is certainly preferable to that of ULIS. Under the former, the seller is bound to preserve the goods only where he is either in possession of them or otherwise able to control their possession(10)

182- 4) A/CN.9/116, annex 2, comment on art.62; A/CONF.97/5, comment on art.76.

5) By virtue of the general rule as laid down by ULIS (Art.8) and the Convention (Art.4); see further supra, paras. 169, 173.

6) Graveson and Cohn, p 105.

7) An express provision to that effect is given by CITC(s.367) where the preservation should take place until the seller repudiates the contract.

8) Supra, paras. 105 ff.

9) Graveson and Cohn, p 104.

while such requirement could not be found under Art. 91 of the latter. Read literally, this Article may lead to the conclusion that the preservation is imposed upon the seller even where the goods are in the possession of the buyer. But this result is of course not intended and it is quite sound, therefore, to assume that a similar requirement applies under ULIS.

Finally, under both ULIS and the Convention the seller is entitled to retain the goods until he has been reimbursed his reasonable expenses by the buyer.(11) So that, his right of withholding delivery may continue even if the buyer has later paid him the full price. In other words, he has a lien over the goods for storage charges which is not the case in English Law where the seller's lien could be claimed only for the price (or any part of it not yet paid).(12)

183. Seller's entitlement to sell

Art. 94.1 of ULIS provides that:

"A party who... is under an obligation to take steps to preserve the goods may sell them by any appropriate means, provided that there has been unreasonable delay by the other party in accepting them ... or in paying the costs of

---

182- 10) E.g.,where payment is against documents and the buyer refuses to pay; see A/CONF.97/5, comment on art.74 (Example 74 B); see also Honnold, Uniform Law, para. 454.

11) A similar principle is provided for under CITC (s.367); see also s.9.8.(2) of DUSA.

12) See Joseph Somes v. the Directors of the British Empire Shipping Co. (1860)8 H.L.C. 338, 345; (11) E.R. 459, 462.

preservation and provided that due notice has been given to the other party of the intention to sell."

While Art. 88.1 of the Convention provides that:

"A party who is bound to preserve the goods ... may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods... or in paying the price or the cost of preservation, provided that reasonable notice of the intention to sell has been given to the other party."(1)

Before considering the conditions of selling the goods in these circumstances, it is important to note that the above provision of ULIS, while entitling the seller to sell for the buyer's failure to accept the goods or to pay the costs of preservation, does not apparently entitle him to do so for the non-payment of the price. Again, it may be that this literal construction is not intended; for it is unsound to entitle him to sell for the costs of preservation while he cannot sell when the buyer's failure relates to his basic obligation, i.e., payment of the price. In addition, entitling the seller to sell in this case brings Art. 94.1 of ULIS in line with Art. 91, which has just been discussed,(2) where the delay

---

183- 1) For a legislative background of the text, see the documents cited in para. 182 (note 1) supra, mutatis mutandis.

2) Supra, para. 182.

in paying the price is expressly stated therein.(3)

So the unpaid seller who preserves the goods may, under both ULIS and the Convention, sell them if two conditions are met.

In the first place, there should be an unreasonable delay in paying the price.(4) The reasonableness is a question of fact depending upon the circumstances of each case. Setting aside the sale of perishable goods for the moment, the SGA does not stipulate for reselling the goods that the buyer's delay must be unreasonable. Nevertheless, this requirement may be contrasted with the general law of contract; in this respect, it is well-settled that where the time of payment is not of the essence and the seller seeks avoidance, by reselling or otherwise , the buyer's delay in making payment should be unreasonable, undue, improper or the like.(5)

In the second place, the seller must give the buyer, in the words of ULIS, a *due notice* notice or, in the words of the Convention, *a reasonable notice of* his intention to sell.(6) Thus, there should be a reasonable period between the notice and the time at which the sale would take place.(7) The reason for

---

183- 3) And that was the reason for adding that ground for sale to the text by the Conference, see A/CONF.97/19, p 413, para. 52 (Boggiano of Argentina).

4) It seems that there is no similar requirement under CITC (s.369).

5) Supra, para. 39.

6) A similar condition is required under CITC "... a reasonable term" (s.369).

7) Graveson and Cohn, p 106.

this requirement is to enable the buyer who would suffer the consequence of the sale to react accordingly, which is the last recourse that might be preserved for him.(8) In applying the general principles, the notice need not be given in a particular form and, further, the buyer would bear the risk in transmitting it.(9)

In English Law too a seller who, according to a statutory power, wishes to resell other than perishable goods must give the buyer a notice of reasonable time to pay or tender the price.(10)

Whether the sale passes a good title to the new purchaser is outside the scope of both ULIS(11) and the Convention and is therefore subject to the proper law of the contract. In English Law, however, it is expressly settled by the SGA that

> if the unpaid seller who has exercised his right of lien or retention or stoppage in transit resells the goods, the buyer acquires a good title to them as against the original buyer(12) irrespective of whether or not the seller has the right to resell the goods as against the original buyer.(13)

183- 8) A/CONF.97/19, para. 54.

9) Supra, paras. 58 f.

10) S.48.2 of the SGA; cf., Graveson and Cohn, where it is considered that the "due notice" in ULIS is an innovation so far as English Law is concerned. Such notice, however, seems not to be required for the resale under DUSA (see OLRC Report, vol.2, pp 412 f). Under UCC, the notice is required only where the sale is made privately; s. 2-709(3).

11) Graveson and Cohn, ibid.

It is to be noted, finally, that neither ULIS nor the Convention defines the method of sale except that such sale should be made by an appropriate means(14) which is a matter of circumstances; and, as suggested, there is no need to refer to any national law in this respect.(15) Therefore, it may be that the seller may sell to any one he choses and the sale may be made by public auction or privately; and it has been suggested that a similar principle applies in English Law since neither the SGA nor the case law provides authority on this question.(16)

184. Seller's duty to sell

Art. 95 of ULIS provides that:

"Where ... the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense , the party under the duty to preserve them is bound to sell them in accordance with Article 94."

183- 12) S.48.2 of the Act; which is the same under UCC (s.2-705.5) and DUSA (s.9-10.5) if the new purchaser buys in good faith. See also s.24 of the SGA where the good faith is required; as to a comparison between s.24 and 48.2, see Benjamin, para. 1233.

13) Atiyah, pp 297 f, 317; Benjamin, para. 1232.

14) Cf., CITC, s.370 in which the sale must be made by public auction if the goods involved have a current price; other goods may be sold in the open market.

15) Cf., A/CN.9/116, annex 2, comment on art.63, para. 3; A/CONF.97/5, comment on art.77, para. 3; in both documents it has been suggested that reference should be made to the law of the country where the sale takes place.

While Art. 82 of the Convention provides that:

"If the goods are subject to rapid deterioration or their preservation would involve unreasonable expense, a party who is bound to preserve the goods... must take reasonable measures to sell them. To the extent possible, he must give notice to the other party of his intention to sell."(1)

Thus, in these circumstances the seller is bound, under ULIS, to sell the goods while under the Convention he must only take "reasonable measures" to make the sale.(2) The latter language appears to be perferable to the former since the seller may never be able, for any reason, to sell the goods to another purchaser; in such an event, it may be wise to require him to make efforts reasonable in the circumstances but not to impose upon him a duty to sell the goods.

On the other hand, the reference by ULIS to Art. 94 discussed above probably indicates that the conditions of sale under that article must also be met here, which means that the sale should not take place unless:- firstly, the delay in paying the price is unreasonable; secondly, a due notice to this effect has been given to the buyer; and, finally, the sale must be made by an appropriate means. If so, the first two

---

183- 16) Benjamin, para. 1260; see also ss.2-705(2) of UCC and 9.10(2), (3) of DUSA.

184- 1) For a legislative background of the text, see the documents cited in para. 182(note 1), supra, mutatis mutandis.

2) There was a proposal to impose the sale upon the seller if the buyer so requested, but it was rejected (A/32/17, annex 1, para. 521).

conditions seem to be questionable since the situation in these circumstances, at least when the goods are subject to rapid deterioration, may require an immediate action to be taken by the seller. And that is why it has been suggested that if deterioration may be expected to occur immediately, notice may be dispensed with, provided it cannot be given sufficiently speedily, even by telephone or teleprinter.(3) Likewise, under the Convention, the seller is not bound to give such notice except to the extent possible in the circumstances.(4)

However, it may well be that the seller who fails to comply with his duty to sell (ULIS) or to take reasonable measures to sell (Convention) would be liable for damages.(5)

In English Law, by contrast, where the goods are of perishable nature, the seller has the right to resell them without requiring him to give the buyer a notice to this effect.(6) Thus, it appears that the solution given by the Convention, so far as this notice is concerned, is a compromise

---

184- 3) Graveson and Cohn, p 106.

4) See further A/CN.9/116, annex 2, comment on art.63, para. 7; A/CONF.97/5, comment on art.77, para. 7, where it has been argued, moreover, that if the goods are rapidly deteriorating, there may not be sufficient time to give notice prior to sale. See also s.370.2 of CITC under which the seller "shall be free to proceed with the sale without giving advance notice".

5) See A/CN.9/116, annex 2, ibid, para. 8; A/CONF.97/5, ibid, para. 8.

6) According to s.48.3 of the SGA.

between ULIS which provides for it and other laws which, on the contrary, do not require it.

185. Effects of sale

Art. 94.2 of ULIS provides that:

"The party selling the goods shall have the right to retain out of the proceeds of sale an amount equal to the reasonable costs of preserving and of selling them and shall transmit the balance to the other party."

And Art. 88.3 of the Convention provides that:

"A party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance."(1)

It is clear from these provisions that there is only one difference between the two laws; while the former binds the seller to transmit the balance to the buyer, it is sufficient under the latter that he accounts to him for such balance. However, no reference is made in either to whether the unpaid seller is entitled to deduct from the proceeds of sale an amount equal to the unpaid price; nor whether has he a lien over such an amount until the dispute with the buyer is settled. If strictly applied, both provisions would give a negative answer though the non-payment of the price

---

185- 1) For a legislative background of the text, see the documents cited in para. 182 (note 1), supra, mutatis mutandis.

may be the only cause for withholding delivery, preservation and for the second sale successively. Oddly enough, the seller is bound to give the buyer the proceeds of sale less subsidiary costs and then he would be entitled to claim his main right, i.e., payment of the price. But it is submitted that this result is, again, not intended whether under ULIS or the Convention.(2)

In any case, it is beyond doubt that the seller is accountable under both laws to the buyer for the proceeds of sale after making the necessary deductions.(3) It follows that the original sale remains alive irrespective of the new sale. And this is another main difference between ULIS and the Convention on the one hand, and, on the other, English Law. It has been held under the latter(4) that the resale according to a statutory power, i.e., in compliance with s.48.3 of the SGA terminates the original contract. The

---

185- 2) See, however, A/CN.9/116, annex 2, comment on art.63, para. 9; A/CONF.97/5, comment on art.77, para.9 where it has been considered that if the party selling the goods has other claims (i.e., other than reasonable costs of preserving the goods and of selling them) arising out of the contract or its breach, under the applicable national law, he may have the right to defer the transmission of the balance until the settlement of those claims.

3) Which seems to be the same under CITC (s.396) in which the sale takes place to the account of the other party. Cf., ss.2-706(6) of UCC and 9.10(7) of DUSA; under both, the seller who resells the goods is not accountable to the buyer for any profit made on a resale.

result is then clear; the seller is not bound to give credit to the buyer for the proceeds of the resale; nor can he claim the contract price.

However, the sale here must carefully be distinguished from that which is provided for under the remedy of damages.(5) In this connexion, the following points should be emphasized.

Firstly, while the latter sale presumes that the contract has already been avoided, the former presumes, on the contrary, that it is still alive.

Secondly, while the latter is relevant to assessing the seller's damages and may even constitute the only basis of such assessment, this is not the case under the former.

Thirdly, in selling the goods in case of damages, the seller certainly acts on his own behalf; accordingly, he retains the whole proceeds of sale. Again, this is not the case under the former sale.

185- 4) R.V. Ward Ltd. v. Bignal [1967] 1 Q.B. 534, overruling Gallagher v. Shilcoch [1949] 2 K.B. 765.

5) Supra, Ch., II, s.II.1.

CONCLUSION

It is clear from the above discussion that the remedies available to the unpaid seller under ULIS and the Convention are: avoidance, damages, an action for the price and suspension of performance. Remarks, evaluations and/or recommendations in respect of both laws have already been pointed out in this study. It may suffice at this point to keep in mind some important remarks.

Firstly, there is a great similarity between ULIS and the Convention to the extent that some basic provisions are quite the same.

Secondly, this similarity must not give rise to confusion where there are still major differences between the two laws. These differences may be categorized into three sets: 1- Some of ULIS' provisions were deleted from the Convention. 2- The conditions required for applying certain provisions under ULIS have been changed by the Convention. 3- Many provisions under the Convention are innovations.

Thirdly, this does not mean that whatever change made by the Convention is necessarily better than the existing texts of ULIS. While, however, this is true to a certain, and probably to a great, degree, it would

appear that some provisions under the Convention are not less complicated than those given by ULIS. Further, some other solutions under this law, though not free from criticism, are more feasible and easier in practice than those provided for by the Convention.

Finally, it would seem regrettable that the Convention, though more than four years had passed since it came into existence, was not signed until 22 June 1984 except by 18 countries of which only 8 countries had conceded to or ratified it. However, one should be an optimist, and it is hopeful that this Convention would find wider acceptance than ULIS by different legal, social and economic systems, which was the clear purpose of UNCITRAL in preparing the new texts.

SELECTED BIBLIOGRAPHY

I- BOOKS and ARTICLES

Atiyah, P.S., The Sale of Goods, 6th ed., London Pitman.

Baer, Marvin G., Seller's Remedies (MS), OLRC, SALE OF GOODS PROJECT, Research Paper No. III.9.

Bateson, Andrew A., Time in the Law of Contract, J.B.L. (1957), p 375.

Beale, Huge, Remedies for Breach of Contract, London, Sweet and Maxwell, 1980.

Beatson J., Discharge for Breach the position of instalments, deposit and other payments due before completion, 97 LQR (1981) p 389.

Benjamin's Sale of Goods, 2nd ed., general editor, Guest, A.G., London, Sweet and Maxwell, 1981.

Berman, Harold J., The Uniform Law on International Sale of Goods: a constructive critique,30 L. and Con. Prob., (1965) p 354.

Berman, Harold J., and Kaufman, Colin, The Law of Internation Commercial Transactions (Lex Mercatoria), H.I.L.J. (1978) p 221.

Bonell, M.J., La Nouvelle Convention de Nations-Unies sur les contrats de vente internationale de Marchandise, 7 Dr. et Pratique du Com. Int.(1981) p 7.

Brière, George, Nation de contrat successif, D. and S., 1957, Chronique, p 153.

Burke,Paul A., International Trade: Uniform Law of Sales, H.I.L.J. (1981) p 473.

Calamari, John D. and Perillo, Joseph M., Contracts, 2nd ed., West Publishing Co., 1977.

Chalmer's Sale of Goods, 18th ed., by Mark, Michael London, Butterworths.

Carbonnier, Jean, Droit Civel, T.4 (Les Obligations), Paris, Presses Universitaires de France.

Cartoon, Bernard J., Drafting an Acceptable Force Majeure Clause, J.B.L. (1978) p 230.

Cheshire and Fifoot's Law of Contract, 10th ed., by Furmston, M.P., London, Butterworths, 1981.

Chitty on Contracts, 2 volumes, 25th ed., by Guest, A.G., London, Sweet and Maxwell, 1983.

Colin, A., et Capitant, H., Traitè de Droit Civil, T.2 (Obligations), Paris, D., 1959.

Cohn, E.J., The Defence of Uncertainty a study in the interpretation of the Uniform Law on International Sales Act 1967, 23 ICLQ (1974) p 520.

Dawson, Francis, Methaphors and Anticipatory Breach of Contract, C.L.J. (1981) p 83.

Devlin, Lord, The Treatment of Breach of Contract, C.L.J. (1966) p 192.

Dugdale, Tony and Yates, David, Variation, Waiver and Estoppel- A Re-AP-praisal, 39 M.L.R. (1976) p 680.

Eorsi, Gyula, The 1980 Vienna Convention on Contracts for the International Sale of Goods, 31 A.J.C.L. (1983) p 333.

Farnsworth, E. Allon, Damages and Specific Relief, 27 A.J.C.L. (1979) p 247.

Feltham, J.D., Uniform Laws on International Sales Act 1967, 30 M.L.R. (1967) p 670.

———————— , The UN Convention on Contracts for the International Sale Goods, J.B.L. (1981) p 346.

Fridman, G.H.L., Sale of Goods in Canada, 2nd ed., Tornoto, The Carswell Co. Ltd., 1979.

Giles, Uniform Commercial Law: an essay on international conventions in national courts, Netherlands Sijthof, Leiden, 1970.

Goldenhielm, Berndt, Some Views on the System of Remedies in the Uniform Law on International Sales, 10 Sca. stud. in Law (1966) p 10.

Graveson,R.H., Cohn, E.J., and Graveson, D., The Uniform Laws on International Sales Act 1967, London, Butterworths, 1968.

Gulotta, James C., Anticipatory Breach-A Comparative Analysis, 50 Tul.L.R. (1976) p 927.

Halsbury's Laws of England, 4th ed., Vol. 9 (Contracts) and Vol. 41 (Sale of Goods), London,Butterworths.

Harris, Robert J., A Radical Restatement of the Law of Seller's Damages: Sales Act and Commercial Code Results Compared, 18 Stan. L. Rev. (1965) p 66.

Honnold, John, The Uniform Law for the International Sale of Goods: The Hague Convention of 1964, 30 L. and Con. Prob. (1965) p 326.

————————, The Draft Convention on Contracts for the International Sale of Goods: An Oveview, 27 A.J.C. L. (1979) p 223.

Honnold, John, Uniform Law for International Sale Under 1980 UN Convention, Kluwer, 1982.

Houin, Roger, Sale of Goods in French Law , ICLQ, Supp. Pub. No. 9 (1964) p 16.

Kahn, Philipe, La Convention de la Haye du ler juillet 1964 portan loi uniform sur la vente internationale des objects mobilier corporels, 17 Rev. Trim. de Dr. Com. (1964) p 689.

————————, La Convention de Vienna du 11 Avril 1980 sur les contrats de vente internationale de marchandise, 33 Rev. Int. de Dr. Comp. (1981) p 951.

Kercher, Bruce and Noone, Michael, Remedies, The Law Book Co. Ltd., 1983.

Kopac, Ludvik, (Introduction to and Commentary on Czechoslovak) International Trade Code, Act No. 101/1963. Translation: Chamber of Commerce of Czechoslovakia, 1967.

Lagergren, Gunnar, A Uniform Law of International Sales of Goods, J.B.L. (1958) p 131.

Langen, Eugen, Transnational Commercial Law, Netherlands, Sijthoff, Leyden, 1973.

Lansing, Paul, The Change in American Attitude to the International Unification of Sales Law Movement and UNCITRAL, 18 A. Bus. L.J. (1980) p 269.

Lawson, Richard, An Analysis of the Concept of " "Available Market", 43 Aus.L.J. (1969) p 52.

Lindgren, K.E., Time in the Performance of Contracts, London, Butterworths, 1976.

McGregor on Damages, 4th ed., London, Sweet and Maxwell, 1980.

McMullen, John, A Synthesis of the Mode of Termination of Contracts of Employment, C.L.J. (1982) p 110.

Magnus, Ulrich, European Experience with the Hague Sales Law, 3 Com. L. YB. (1979) p 105.

Marty, G., and Raynaud, P., Droit Civil, t. 2 (Les Obligations) Paris, S., 1962.

Mazeaud, Leçons de Droit Civil, t. 2, vol. 1, Montchrestien, Paris, 1969.

———, Leçons de Droit Civil ,t. 3, vols. 1 and 2, Montchrestien, Paris, 1968.

Michida, Shinichiro, Cancellation of Contract, 27 A.J.C.L. (1979), p 279.

Monaco, Riccardo, Relationship Between the Two Conventions on Sale Adopted at the Hague 1964 and the Future Conventions Resulting from the Work being Done by UNCITRAL, 3 Italian YB. of Int. L. (1977) p 50.

Nicholas, Barry, Rules and Terms-Civil Law and Common Law, 48 Tul. L. Rev. p 946.

———— , Force Majeure and Frustration, 27 A.J.C.L. (1979) p 231.

———— , French Law of Contract, London, Butterworths, 1982.

Nordstrom, Robert J., Sales, West Publishing Co. 1970.

OLRC Report on Sale of Goods, 3 volumes Ontario, 1979.

Perrot, D.L., The Vienna Convention 1980 on Contracts for the International Sale of Goods, 1 Int. Cont. L. and F. Rev. (1980) p 577.

Planiol, M. et Ripert G., Traité Pratique de Droit Civil Français, 2em ed., t. 6, par Esmein, P., and t. 10 (vente) par Hamel, J., Paris, L.G.D.J.

Samek, R.A., The Relevant Time of Foreseeability of Damages in Contract, 38 Aus. L.J. (1964) p 125.

Schmitthoff, Clive M., Sale of Goods, 2nd ed., London, 1964 . Stevens .

———————, Export Trade, 7th ed., London, Stevens, 1980.

Sebert, John A., Remedies Under Article Two of the Uniform Commercial Code: an agenda for review, 130 Uni. of Pan. L. Rev.

Shea, A.M., Discharge from Performance of Contracts by Failure of Condition, 42 M.L.R. (1979) p 623.

Simmonds, The Uniform Laws on International Sales Act 1967, Solicitor's Journal (111) p 781.

Stannard, J.E., Frustrating Delay, 46 M.L.R. (1983), p 738.

Starck, Boris, Droit Civil (Obligations), Paris, Librairies Techniques, 1972.

Swanton, Jane, Discharge of Contracts for Breach, 13 M.U.L.R. (1981) p 69.

Szakats, Alexander, The Influence of Common Law Principles on the Uniform Law on the International Sale of Goods, 15 ICLQ (1966) p 749.

Sutton, K.C.T., Sales and Consumer Law in Australia and New-Zealand 3rd ed., The Law Book Co., 1983.

Thomson, T.M., The Effect of Repudiatory Breach, 41 M.L.R. (1978) p 137.

Treitel, G.H., Remedies for Breach of Contract, Int. Enc. of Comp. Law, vol. 7, Ch., 16.

White, James J. and Summers, S., Handbook of the Law Under the Uniform Commercial Code, 2nd ed., Westpublishing Co., 1980.

Williston on Contracts, 3rd ed., by Jaeger, Baker Voorhis and Co. Inc.

———————————— , Sales, 4th ed., vol. 2 by Squillante and Fonseca, (LCP and BW Pub.) 1974.

Wortley B.A., A Uniform Law on International Sales of Goods, 7 ICLQ (1958) p 1.

Yates, David, Exclusion Clauses in Contracts, 2nd ed., London, Sweet and Maxwell, 1982.

II. DOCUMENTS

A/32/17: Report of UNCITRAL of the work of its 10th session, in 7 UNCITRAL Yearbook, 1977, p 11.

A/33/17: Report of UNCITRAL of the work of its 11th session, in 8 UNCITRAL Yearbook, 1978, p 11.

A/CN.9/31: Analysis of replies and comments by governments on the Hague Convention of 1964. Report of the S.G., in 1 UNCITRAL Yearbook, 1968-1970, p 159.

A/CN.9/35 and Annexes: Report of the W.G., 1st session, in 1 UNCITRAL Yearbook, 1968-1970, p 176.

A/CN.9/52: Report of the W.G., 2nd session, in 2 UNCITRAL Yearbook, 1971, p 50.

A/CN.9/62, Add.1 and Add.2: Progress report of the W.G., 3rd session, in 4 UNCITRAL Yearbook, 1973, p 77.

A/CN.9/75: Progress report of the W.G., 4th session, in 4 UNCITRAL Yearbook , 1973, p 61.

A/CN.9/87, and Annexes: Progress report of the W.G., 5th session, in 5 UNCITRAL Yearbook, 1974, p 29.

A/CN.9/100, and Annexes: Report of the W.G., 6th session, in 6 UNCITRAL Yearbook, 1975, p 49.

A/CN.9/116, and Annexes: Report of the W.G., 7th session, in 7 UNCITRAL Yearbook, 1976, p 87.

A/CN.9/125, Add.1 to 3: Comments by Governments and International Organizations on the draft convention on the international sale of goods, in 8 UNCITRAL Yearbook, 1977, p 109.

A/CN.9/129: Analysis of Comments by Governments and International Organizations on the draft Convention on the international sale of goods as adopted by the W.G. Report by the S.G., in 8 UNCITRAL Yearbook, 1977, p 142.

A/CN.9/131: Study on security interests. Report by the S.G., in 8 UNCITRAL Yearbook, 1977, p 171.

A/CN.9/257: Status of Convetions. Note by the Secretariat (6 June 1984).

A/CN.9/WG.2 / WP.6 : Analysis of comments and proposals relating to article 1-17 of ULIS. Note by the S.G., in 2 UNCITRAL Yearbook, 1971, p 37.

A/CN.9/WG.2/WP.9 : Ipso facto avoidance in ULIS. Report of the S.G., in 3 UNCITRAL Yearbook, 1972, p 41.

A/CN.9/WG.2/WP.15 : Analysis of comments and proposals by Governments relating to Articles 56 to 70 of ULIS. Report by the S.G., in 4 UNCITRAL Yearbook, 1973, p 31.

A/CN.9/WG.2/WP.16 : Obligations of the seller in an international sale of goods; consolidation of work done by the W.G. and suggested solutions for unresolved problems. Report of the S.G., in 4 UNCITRAL Yearbook, 1974, p 36.

A/CONF.97/19 : UN Conference on Contracts for the International Sale of Goods, Vienna 10 March-11 April 1980, Official Records.

A/CONF.97/5 : Commentary on the draft convention on contracts for the international sale of goods. Report by the Secretariat, in A/CONF.97/19, p 14.

Diplomatic Conference on the Unification Of the Law Governing the International Sale of Goods, The Hague, 2-25 April 1964. Two volumes: vol. 1 (Acts) and vol. 2 (Documents).

Document V/Prep/3 : Note of the special Commission on the observations presented by various countries, and by ICC relating to the 1956 Draft of a Uniform Law on the International Sale of Goods, in Hague Conference, vol. 2, p 178.

Documents V/Prep/7-19 : Compliation of the observation and amendments concerning the 1956 draft of a Uniform Law on the International Sale of Goods, in Hague Conference, vol. 2.

Documents Conf/V/Amend/1-105 : Amendments submitted during the Hague Conference, in Hague Conference, vol. 2.